Supreme Court, U.S.
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No 98 -

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

Marie-Thérèse Assa'ad-Faltas, MD, MPH
[hereinafter "Dr. Faltas"],

Petitioner,

v.

The University of South Carolina
[hereinafter "USC"], *et al.*

Respondents.

and

Marie-Thérèse Assa'ad-Faltas, MD, MPH
[hereinafter "Dr. Faltas"],

Petitioner,

v.

The Attorney General of Virginia
for the Commonwealth of Virginia; *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNIFIED PETITION FOR A WRIT OF CERTIORARI
AND APPENDIX THERETO

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QUESTIONS PRESENTED

1. Does Title VII prohibit *quid-pro-quo* discrimination by religion as it does with sex?

2. Does the crime-fraud-*or-tort* exception pierce the attorney-client privilege and render an attorney liable to a non-client if he advises a client to violate Title VII to the non-client's damage?

3. In a Title VII case, is the employer concluded by its own internal review process if such process finds no performance reason for the adverse employment action against the employee?

4. Do this Court's holdings in *Faragher v. Boca Raton* and *Burlington Industries v. Ellerth*, 66 LW 4634 and 4643 (1998), prohibit the employer from taking the employee's demand for safeguards against recurrence of the Title VII violations as a rejection of an offer of reinstatement?

5. If the answer to questions 3 and 4 above is positive, does this Court's holding in *McKennon v. Nashville Banner*, 63 LW 4105, 115 S.Ct. 879 (1995), limit trial, and perforce discovery, in a case as here presented to the issue of damages, deeming liability established as a matter of law?

6. Since education is compelling thought, and educational testing is compelling speech, can states operate universities as their *alter egos* without violating the First Amendment that prohibits government from compelling speech no matter how "correct" or salubrious that speech is?

7. Does the Republican Form of Government, guaranteed to each state under Title IV, Section 4, of the Constitution of the United States, prohibit a state attorney general from *totally* abdicating to a private lawyer the determination of what the state's litigation position should be in civil suits?

8. Do Article III of the Constitution of the United States and this Court's unanimous holdings in *Mathews v. Weber*, 423 U.S. 261 (1976), and *Gomez v. U.S.*, 490 U.S. 858(1989), require those United States Courts of Appeals that decide to *totally* abdicate the adjudication of certain appeals to their Office of Staff Counsel to first obtain the consent of the parties to the appeal and allow them to object to the Office of the Staff Counsel's proposed dispositions of such appeals?

9. Do mere acts of arguing that the answers to questions 2 and 7 above should be positive and suggesting early settlement negotiations warrant Rule 11 sanctions on a plaintiff or her lawyer?

List of Parties to this Petition

Petitioner: Marie-Thérèse Assa'ad-Faltas, MD, MPH [hereinafter "Dr. Faltas"]

Respondents: The University of South Carolina [hereinafter "USC"] and its Board of Trustees in its corporate capacity; John Palms and James Moeser both individually and officially as USC President and Provost, respectively; Edward Floyd and Mark Buyck officially as chairs of USC's Board of Trustees and its Academic Affairs Committee respectively; and Thomas Stepp individually and as Secretary of USC's Board of Trustees; Alton McCoy, Edward Vaughn and Margaret Stillwell officially as USC's Internal Auditor and South Carolina auditors, respectively; South Carolina Department of Health and Environmental Control [hereinafter "DHEC"]; Douglass Bryan and Foster Young officially as DHEC Commissioner and Deputy Commissioner, respectively; The Attorney General of Virginia for the Commonwealth of Virginia; Carol Nance; James Padget; Robert Ball; Patrick Barrissi; Judy Weeks; Russ McKinney; Walter Parham; Clifford Scott; J. O'Neil Humphries; Caroline Strobel; Marsha Welsh; and Laurence Dark, each both individually and officially; James Ebersole; Ernest P. McCutcheon; Joan M. Altekruse; Laura Bird; Eric Brenner; James Sears, Bobby Gist; David Sheridan; Ernest Altekruse; and Richard Creswick, in their individual capacities; The Lawfirm of Nexsen, Pruet, Jacobs & Pollard [hereinafter NPJP], in its corporate capacity; and Victoria Eslinger; Susan McWilliams; John Trussell; and Edward Turbeville, in their individual capacities, and other unknown persons, in their individualcapacities.

Upon Petitioner's information and belief, none of the parties is a publicly traded corporation.

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Nor are there any procedural problems with
Petitioner's standing to raise the questions herein.

II. ON THE STATUTORY QUESTIONS.

The decisions below raise important issues on Title VII
religious discrimination and retaliation cases.

III. ON THE CONSTITUTIONAL QUESTIONS.

On question 6, there are conflicts among the circuits
and among this Court's various holdings and dicta.
Absent a definitive, widely applicable, holding
from this Court, the circuits' paths diverge.
Little is more unpredictable than a court's decision
on sovereign immunity for a state university.

On questions 6 and 7, novel constitutional questions are posed.

On question 8, current practices in lower courts amount to
a far enough departure from the accepted course of judicial
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Petitioner prays this Court to issue its writ to review these cases.

Opinions Below and Basis of this Court's Jurisdiction

In July and August 1996, U.S. District Judge Joseph F. Anderson, Jr., (D.S.C.) dismissed Petitioner's two cases in their entirety with prejudice. In the second case, he had awarded, and refused to reconsider, Rule 11 sanctions against her in favor of Respondent Eslinger and her collaborators. Shortly thereafter, he disqualified himself from all cases involving USC and, eventually, from all matters involving Petitioner herself. About that time, Petitioner obtained letters written on 28 October 1993 by Respondent Eslinger (A26-A31) and promptly used them in a consolidated Rule 60(b) motion in both cases. That motion was stamped "DENIED" on 17 January 1997 by U.S. District Judge Dennis Shedd, to whom the cases had been reassigned (A12).

Petitioner timely appealed the judgments and the denials of the Rule 60(b) motion. The U.S. Court of Appeals for the Fourth Circuit deferred consideration of consolidation of both cases, eventually denied consolidation as moot after the cases had been briefed separately, and affirmed by summary unpublished *per curiam* opinion in the first case (16 November 1998) and in the second case (6 October 1998) wherein it also denied a timely petition for rehearing (23 November 1998). The judgments and orders of the Court of Appeals and orders of the District Court are in Appendices A1-12 hereto.

On 8 March 1999, the Honorable Chief Justice of the United States granted Petitioner an extension of time to and including 16 and 19 March 1999 under applications ## A-594 and 595 in the first and second cases respectively. For judicial economy, both judgments of the court of appeals are sought to be reviewed through this petition per Supreme Court Rule 12.4, which provides in pertinent part:

> When two or more judgments are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the judgments suffices.

Jurisdiction of this Court over this timely unified petition is invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

Article III, Section 1, of the U.S. Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Article IV, Section 4, of the U.S. Constitution provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Title VII of the Civil Rights Act of 1964, as Amended in 1991, 42 U.S.C. §§2000e-2 and 2000e-3 provide in pertinent parts, respectively:

> (a) It shall be an unlawful employment practice for an employer
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.
>
> ****************
>
> (m) Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice even though other factors also motivated the practice.

****

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Statement of the Case

Petitioner is a physician and surgeon (M.D.) and Master of Public Health (M.P.H.) of Egyptian National origin, Coptic race, and membership in both the Copt Catholic and Orthodox Churches.

Having first come to the U.S. as a Fulbright Scholar in 1979, she experienced disabling outcomes of a surgery performed on her and employment difficulties where she always proved ahead of her time medically (in refusing to work under occupational hazards that later exploded) and legally (in rejecting acts and words of a supervisor of a nature this Court later held amounted to sexual harassment). Those experiences relegated her to seeking employment far below her qualifications and talents. (A13-14, A16-17) The latest of those was a non-tenure track faculty position in *the* least competitive specialty of Medicine (Preventive Medicine) in one of *the* least competitive medical schools in the U.S. (USC's). *Id.* Throughout 1992 and the first quarter of 1993, Dr. Faltas had invariably excellent performance evaluations and was promoted. But in January 1993, Respondent Joan Altekruse (then a tenured senior faculty member on the verge of retirement) organized, and pressured her to attend the monthly meetings of, a group called "Women of Faith and Spirit" which Dr. Faltas perceived as dedicated to glorifying feminism and lesbianism and to bashing the Bible as a concoction of male chauvinist pigs. (A15)

Dr. Faltas left the 25 March 1993 meeting of that group, telling Altekruse that she wanted none of the group or anyone associated with it. Altekruse's immediate response mentioned "reprisals" (A15-16).

Altekruse, who was not Dr. Faltas' supervisor, had served on the search committee that had installed then-incumbent Provost Moser and had, years earlier, hired the two other tenured faculty members in USC's Division of Preventive Medicine. These connections enabled her to convene a meeting that summarily demoted Dr. Faltas and demanded that she single-handedly have her Healthcare and Welfare Restructuring Proposal "passed as a bill in the United States Congress by June 1993" or forfeit all credit for her two years' work, and that she undergo immediate mental health examination because her having taken one day off for a cold somehow proved a rapidly deteriorating mind. (A15-16, A17-20) When Dr. Faltas responded that President Clinton could not do what they were asking of her but that she would undergo any mental health examination to which Altekruse would submit herself too, she was suspended *without notice, cause or even an allegation of inadequate performance (A20).* Dr. Faltas appealed to USC School of Medicine's Dean who, after meeting with Altekruse's immediate supervisors and with USC's associate General Counsel, decided to lift Dr. Faltas' suspension. Altekruse then contacted Dr. Faltas' prior employers and was "advised" by Respondent Virginia Assistant Attorney General Nance to pretend that Dr. Faltas had concealed her past employment and to contact the Immigration and Naturalization Service (INS) to render her "technically unemployable" which Altekruse did. On 9 June 1993, she procured a secret vote to dismiss Dr. Faltas based on a memorandum from Altekruse claiming that Dr. Faltas must be prevented from practicing her profession because she filed Title VII charges and because her religious views *"on sexual orientation and creationism"* (A18) antagonize people whose friendship Altekruse and her cohorts had cultivated (A20-22).

Dr. Faltas then appealed formally per contract. A panel of three USC medical professors convened on 3 September 1993, examined every word in the charges of dismissal and all proffered purported support thereof, and asked questions of Dr. Faltas (A22-23).

The panel found absence of support for the charges of dismissal and concluded **"unanimously"** that Dr. Faltas should **"be reinstated in good standing" (A23**) That was transmitted to the Dean and to the State Human Affairs Commission (SHAC), acting on behalf of EEOC, with whom Dr. Faltas had filed a timely charge of discrimination. SHAC wrote to USC suggesting that the matter be conciliated by reinstating Dr. Faltas with backpay and shielding her from future discrimination and retaliation by Altekruse and her two cohorts **(A23-25)**.

Learning of that, Altekruse and her two cohorts surreptitiously and illegally took Dr. Faltas' personnel files to the office of a private lawyer, Respondent Eslinger, of NPJP. On 28 October 1993, Eslinger wrote to them, with a copy to USC's General Counsel, that Dr. Faltas could be fired anyway, and, if Dr. Faltas sues, USC can use her past opposition to Title VII-prohibited conduct to poison the jury against her. Eslinger also strongly recommended that USC cause more INS problems for Dr. Faltas and pretend that Dr. Faltas' request for safeguards against recurrence of the discrimination is a rejection of an offer of reinstatement (which had never been extended to Dr. Faltas *by her employer*) (A26-31). On 8 November 1993, USC School of Medicine's Dean wrote Dr. Faltas a letter of termination *parroting Eslinger's language* **(A32).** SHAC immediately dumped Dr. Faltas' charge to EEOC which issued her a right-to-sue letter. Thereafter, USC hired SHAC's deputy commissioner, Respondent Gist (A25, A32). Dr. Faltas then filed the first case *pro se* in U.S. District Court (D.S.C.).

Several defendants claimed improper service; and the others filed Rule 12(b)(6) motions based on sovereign immunity and failure to make RICO, Title VII, and other claims. The motions were argued before a magistrate judge, in October 1994, and again before Judge Anderson, in March 1995, while discovery motions had been suspended pending the outcome of the motions to dismiss. Dr. Faltas preserved her position that higher education is not a constitutional function of government and that USC should not partake of the state's sovereign immunity. Judge Anderson refused to dismiss any of Dr. Faltas' non-RICO claims but held that USC enjoyed sovereign immunity on all non-Title VII claims.

He did dismiss, but without prejudice, some defendants who had claimed improper service. Dr. Faltas promptly filed the second case, by attorney Orin Briggs, against the latter defendants, adding to the new complaint such parties and plausible claims as were revealed through discovery in the first case[1]. (A33-34) The private lawyer's senior partner promptly wrote Mr. Briggs threatening a Rule 11 motion if all claims against the lawyers are not voluntarily withdrawn.

Dr. Faltas asked that no written response be made; but. Briggs' collegiality demanded that he write back that none of the claims are frivolous but he is open to early settlement talks. Rule 11 sanctions were still imposed under an unproven theory that the claims were made to "extort" a settlement. In each case, Respondents deposed Dr. Faltas for five days, in the presence of a magistrate or a special master, after obtaining from her about 100 interrogatory answers, 2,500 documents, and 15 tapes. Yet, Judge Anderson dismissed both cases, reasoning: (in his 11 and 19 July 1996 orders, at 7 and 42, and at 6, respectively) that:

> "To require the court to make any more detailed finding as to prejudice, that is, to identify what the defendants to not know, is in essence to require the court to prove a negative."
> the opposing party has been put to undue expense and has, nonetheless, been unable to gain *adequate information to prepare a defense* prior to the close of discovery, the case should be ended
> defendants have been put to incredible expense but have yet to pin down the basis of plaintiff's many broad allegations against them or to learn *the identity of witnesses known to plaintiff <u>who might have information helpful to the defense</u>*. [emphasis added]

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1 Discovery had revealed that South Carolina's Attorney General farms out wholesale all the state's civil cases to private lawyers and that Altekruse had lobbied to have Eslinger hired to defend USC, at state expense, against Dr. Faltas' civil suit. So, Dr. Faltas included a challenge to that scheme: only constitutional officers of the state, not private people, may decide the state's litigation position and since the scheme, allegedly operated negligently, injured her in by enabling a state institution to fire her at the behest of a private lawyer who stood to earn fees by defending the state on that firing.

Dr. Faltas tried in vain to have him consider that no facts or witnesses helpful to the Defense exist. She later briefed the Court of Appeals that, in a Title VII case, either the plaintiff's claims are meritorious, in which case the defendants will find nothing helpful to them in discovery, or the defenses are meritorious, in which case the defendants would know their defenses before litigation commences. The Court of Appeals did not address any of her arguments, but summarily ruled that "her demeanor" in her deposition in the first case, and her having fallen too tired/ill at 5:30 pm to continue the fifth day of her deposition in the second, warrant the sanction of dismissal.

Reasons to Grant the Writ (Summary)

I. IN GENERAL. The facts of this case are uncontested and are almost entirely told by documents (of which the most telling ones are appended hereto) of record in the lower courts. Nor are there any procedural problems with Petitioner's standing to raise the questions herein. Moreover, this Court could chose to grant *certiorari* on any one of the nine questions, on all nine of them, or on any combination of any two or more of them and still compose a coherent opinion that would restore justice to Petitioner and answer questions of immense constitutional and statutory importance.

II. ON THE STATUTORY QUESTIONS. The decisions below raise important issues on the principles and practice of adjudicating Title VII religious discrimination and retaliation cases.

III. ON THE CONSTITUTIONAL QUESTIONS. On Question 6, there is conflict among the circuits among this Court's holdings and dicta. Core constitutional question posed here were not addressed before. On Question 8, this Court's holdings in Article III cases suggest that current practices in lower courts amount to a far enough departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Reasons to Grant the Writ (On Questions 1-5)

The jurisprudence of religious discrimination in employment almost entirely overlooked the risk of *quid-pro-quo* religious harassment.

An employee's religious autonomy and dignity are as worthy of legal protection as her sexual autonomy and dignity. *Quid-pro-quo* religious harassment is rarely overt as an employer asking an employee to convert to a religion under penalty of discharge or demotion; but it could, and more often than recognized does, take a more subtle form of an employer or supervisor (very pleasantly) inviting a subordinate "to my church." It may be more detrimental to the work place than *quid pro quo* sexual harassment. Those who demand sexual favors know that they seek a wrong and may experience pangs of conscience if rejected. But one who invites another to a church assumes a degree of self-righteousness and may take a rejection of the invitation as proof of the rejector's bad judgment as to the best source of holiness and/or of indifference to holiness and integrity. And as in *quid pro quo* sexual harassment, where the employer or supervisor may reward with job benefits the subordinate who dispenses sexual favors, the employer or supervisor may, possibly subconsciously, trust and prefer the employee who comes to share a religious devotion.

But unlike hostile environment harassment, *quid pro quo* harassment may be directed at employees who do not profess any religion. Nor may the employee be able to accomplish the "visit" to another's place of religious practice with the religious detachment of a tourist in the Sistine Chapel or the Blue Mosque. *The invitation is not to an empty edifice but to a practice.* And in many religions, the mere act of listening to words critical of, or contrary to, one's religion is a sin. *Here, a physician with no performance or professional inadequacies whatsoever was fired and branded mentally ill solely because she refused to accept the religious views of a senior co-worker who had more leverage with the employer.*

Despite this Court's and Congress' careful jurisprudential development of Title VII, Title VII *litigation*'s risk/benefit ratio keeps it one of the least rewarding legal endeavors. In *Kremer v. Chemical Construction Corporation*, 456 U.S. 461 (1982), this Court gave preclusive effect *against the employee* to a state agency determination. Reason does not appear why, as here, the employer's own panel's determination should not have preclusive effect *against the employer.*

Nor does reason appear why when as here the uncontested documents show that the employer took impermissible motives into account, liability could not be deemed established as a matter of law. Such guidance by this Court would streamline Title VII cases below.

On Question 6

There is considerable tension within this Court's line of cases on whether state universities are *alter egos* of their respective states. Earlier, this Court often ruled that a university does not partake of its state's sovereign immunity; *e.g., Hopkins v. Clemson Agricultural College of South Carolina;* 221 U.S. 636 (1910); *Nevada v. Hall,* 440 U.S. 410 (1979); *Jefferson County Pharmaceutical Ass. v. Abbott Labs,* 460 U. S. 150 (1983); or deferred the question; *e.g., Arkansas v. Texas,* 346 U.S. 368 (1953). In other cases,*e.g.; Lake Country Estates v. Taboe Regional Planning Agency;* 440 U.S. 391 (1979), this Court had one inquiry: "does the agency exercise a slice of state power?"

Absent a definitive, widely applicable, holding from this Court, the circuits' paths diverge. Little is more unpredictable than a court's decision on sovereign immunity for a state university. The Third Circuit uses a nine-factor inquiry; *Blake v. Kline,* 612 F.2d 718 (3rd Cir. 1979), *cert. denied,* 447 U.S. 921 (1980); based on *Urbano v. Board of Managers,* 415 F.2d 247 (3rd Cir. 1969), *cert. denied,* 397 U.S. 948 (1970),.also adopted in *Hall v. Medical College of Ohio at Toledo,* 742 F.2d 299 (6th Cir. 1984). The Fourth Circuit uses a four-point analysis; *Ram Ditta v. Maryland Ntnl Capital Park Commission,* 822 F.2d 456 (4th Cir. 1987).The Tenth Circuit uses a two-pronged analysis; *Unified School District No. 480 v. Epperson,* 583 F.2d 118 (10th Cir. 1978) The Eleventh Circuit uses a tripartite test; *Harden v. Adams,* 760 F.2d 1158 (11th Cir 1985). The circuits generally proceed on a case-by-case basis, often giving determinative weight to the source of the funds from which a judgment against the university may be paid.But state courts often hold state agencies liable to civil suits irrespective of the source of funds; *e.g., Smith v. State,* 289 N.C. 303, 222 S.E.2d 412 (1976); and this Court struck down the source-of-funds-to-pay-judgment doctrine in its narrow holding in *Regents of the University of California v. John Doe,* 65 LW 4129 (1997).

And *Rosenberger v. Rector and Visitors of the University of Virginia*, 63 LW 4703 (1995), began by assuming without analysis that the "University of Virginia [is] an instrumentality of the Commonwealth for which it is named." A core constitutional inquiry "instrumentality for what?" was not made, presumably because the answer is obvious.

Yet education, noble and salubrious as it is, is but compelled thought and speech, albeit the type of thought and speech deemed by the academic consensus of the time to be correct[2]. First Amendment jurisprudence developed that government may not compel non-commercial speech no matter how correct or salubrious that speech is; *Hurley v. Irish-American GLABG of Boston*, 63 LW 4625 (1995).

Sates may no more operate instrumentalities dedicated to compelling thought and speech (under the noble title of higher education) than ones dedicated to unreasonably searching and seizing people's homes. Both functions are equally forbidden by the Constitution. A state has many arms, but none that may be used to pound ideas into adult heads. *Ideas must be left to set in under their own academic gravitas, not under the weight of the heavy arm of the state.*

The novelty and boldness of this argument should not be mistaken for a potential for mischief. *States would not have to divest themselves of their universities: only divest their universities of any state powers*, or cease subsidizing higher education: only cease subsidizing it with sovereign powers.[3] And the states' police power to license professionals, which is separate from higher education, is not affected: not all graduates are subject to state licensure; and not all who are subject to state licensure are graduates of state universities.

But it has broad significance and particular relevance here: Altekruse descended on Dr. Faltas with all the might and money of South Carolina to compel her to abandon her belief in "creationism." No private university could have afforded, or even authorized, such endeavor.

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2 This is true of evolving grammar of languages, of whether the Earth is flat, round or oval, of the best treatment of a disease , of types of subatomic particles, *etc.*

3 Government is always free to dispense financial aid to needy individuals without cloaking such individuals with government powers.

On Question 7

In *Richardson v. McKnight*, 65 LW 4579 (1997), this Court denied, on extra-constitutional grounds, sovereign immunity to a private contractor running a state prison. *A different, unavoidably constitutional, question is posed here. Unlike a monarchy, a republican form of government does not permit those elected or appointed to sovereign functions to bequeath attributes of sovereignty to a relative or even to an exquisitely qualified person.* Certain functions are deemed to require election to office or appointment by an elected Executive and confirmation by an elected Legislature.

South Carolina's scheme here challenged does not merely allow its attorney general to engage private help on a contractual basis to pursue a state litigation objective he has set. It allows him to *totally* abdicate to private lawyers the decision of whether the state should even enter into litigation and what the state's litigation position, not merely tactics, should be. Petitioner urges that litigation position is a state policy decision that cannot be privatized in a republican form of government.

On Question 8

In *M.L.B. v. S.L.J.*, 65 LW 4035 (1996), this Court reaffirmed its line of holdings that

> "When an appeal is afforded, ... it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause."

And *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976), held:

> "The federal sovereign, like the states, must govern impartially."

Challenged here the Fourth Circuit's policy of assigning all *pro se* cases, from saints or from prisons, fee-paid or *in forma pauperis*, to its Office of the Staff Counsel. Its own Chief Judge Wilkinson, concurring in *Nasim v. Warden*, 64 F.3d 951, 958 (4th Cir. 1995), admitted:

> "[F]ederal courts resort to adjudicative systems in which decisions are handed down with **only the tangential involvement of Article III judges.** The use of staff counsel and other alternative modes of judicial decisionmaking has been increased ....

> Whenever claims are disposed of without the closest attention of the judges, **the legitimacy of the federal courts is at risk.**"

This Court's unanimous *Mathews v. Weber*, 423 U.S. 261 (1976), and *Gomez v. U.S.*, 490 U.S. 858 (1989), conditioned U.S. magistrates' participation in matters not specifically enumerated by statute on two factors: (1) consent of all parties and (2) constant knowledge of, and ability by any party to object to, everything the magistrate recommends to the district judge. Unlike U.S. magistrate judges, members of an office of staff counsel are not subject to any judicial code of conduct or to the mandate to disqualify themselves in situations listed in 28 U.S.C. §455. So, an entire class of appellants, defined only by their inability or unwillingness to hire a lawyer, find their cases adjudicated from A to Z by unknown non-Article III people who are not governed by any standard other than their probable desire to decrease their work load by summarily affirming all appeals "on the reasoning of the district court" and who may in fact have such other serious conflicts of interest that would have required the disqualification of a U.S. Justice, judge or magistrate judge.

That system produces results shocking to the conscience like those obtained here, where dismissal of a meritorious plaintiff's case is affirmed under the unthinkable notions that her mere "demeanor" in a deposition[4] one held in the presence of a magistrate judge (who could have held her for contempt of court if her demeanor had been offensive or compelled her to answer if she had refused or evaded) no less—"fully warrants" dismissal. Equally shocking is the affirmance of dismissal in the second case because Dr. Faltas could not *make* the special master excuse her *for the day* at 5:30 p.m. on the fifth day of her deposition—all after Judge Anderson wrote that he "does not doubt in the least that she was very tired [at that time]."

And most shocking is summary affirmance of Rule 11 sanctions without any fault within the claims that incurred them, thus making Dr. Faltas indebted to the very people who injured her.

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[4] "Demeanor" is firmly established as a criterion *for a fact finder, not a jurist of law*, to determine credibility of the witness, but nothing else.

While the current work overload of the federal judiciary is undeniable, the answer is not a de facto repeal of Article III of the Constitution of United States. At the very least, this Court could order the circuits' offices of staff counsel to disclose the name of the staff counsel member adjudicating the case, and give the parties to the appeal an opportunity to see, and object to, the opinion disposing of the appeal written by that staff counsel member before it is rubber-stamped by the panel of judges—a fraction of the requirements imposed on the substitution by a U.S. magistrate for one, not three, Article III judge.

It cannot be overemphasized that the work of the Office of Staff Counsel's member who writes an opinion for a panel of judges whose names appear on it *is nothing like the work of a Justice's or judge's law clerk in chambers.* Members of Offices of Staff Counsel are not selected by, or work in proximity to, the judges. Nor do they discuss the cases with the judges or even receive prior directions from the judges on what the disposition should be or on what grounds.

Taking Chief Judge Wilkinson at his public word, the involvement of judges is only "tangential," and that scheme undermines "the legitimacy of federal courts."

On Question 9

It is urgently necessary for this Court to set guidelines that would restrain the lower court's tendency to misuse their recently-expanded Rule 11 powers to stifle creativity in the Law.

Conclusion

WHEREFORE, the writ should be granted.

Respectfully submitted on 16 March 1999 by

Orin G. Briggs,
Attorney for Petitioner
P.O. Box B
Irmo, S.C. 29063
Telephone: (803) 957-4383

As the letters and memoranda mentioned in the Statement of the Case are essential to understanding this petition, they are reproduced/transcribed in the Appendices in compliance with Supreme Court Rule 14.1(i)(vi).

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT No. 96-2159

MARIE ASSA'AD-FALTAS, **on behalf of herself and the class she represents,** *Plaintiff-Appellant,*
SORAYA F. FARES, *Plaintiff,*

v.

UNIVERSITY OF SOUTH CAROLINA; ATTORNEY GENERAL OF THE COMMONWEALTH OF VIRGINIA; CAROL NANCE; BOARD OF TRUSTEES, in its corporate capacity; JOHN PALMS, both individually and officially as USC president; JAMES MOESER, both individually and officially as Provost; EDWARD FLOYD, officially as chair of USC's Board of Trustees; MARK BUYCK, officially as chair of USC's Academic Affairs Committee; THOMAS STEPP, individually and as Secretary of USC's Board of Trustees; ALTON McCoy, officially as USC's Internal Auditor; EDWARD VAUGHN, officially as South Carolina Auditor; MARGARET STILLWELL, officially as South Carolina Auditor; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; DOUGLASS BRYAN, officially as DHEC Commissioner; FOSTER YOUNG, officially as Deputy Commissioner of DHEC; JAMES PADGET, both individually and officially; ROBERT BALL, both individually and officially; JUDY WEEKS, both individually and officially; RUSS MCKINNEY, both individually and officially; WALTER PARHAM, both individually and officially; CLIFFORD SCOTT, both individually and officially; J. O'NEAL HUMPHRIES, both individually and officially; CAROLINE STROBEL, both individually and officially; LAWRENCE DARK, both individually and officially; JAMES EBERSOLE; ERNEST P. MCCUTCHEON; JOAN M. ALTEKRUSE; LAURA BIRD NOTTINGHAM; ERIC BRENNER; JAMES SEARS; MARSHA WELSH, both individually and officially; PATRICK BARRISSI, both individually and officially,

Defendants-Appellees,

and

ATTORNEY GENERAL FOR THE STATE OF NORTH CAROLINA; MARY SECHREST, both individually and officially; JOHN DOE, unknown person and private organizations in their individual capacities, *Defendants.*

MARIE ASSA'AD-FALTAS, **on behalf of herself and the class she represents,** No. 97-1243 *Plaintiff-Appellant,*
SORAYA F. FARES, *Plaintiff,*

v.

UNIVERSITY OF SOUTH CAROLINA; ATTORNEY GENERAL OF THE COMMONWEALTH OF VIRGINIA; CAROL NANCE; BOARD OF TRUSTEES, in its corporate capacity; JOHN PALMS, both individually and officially as USC president;

JAMES MOESER, both individually and officially as Provost; EDWARD FLOYD, officially as chair of USC's Board of Trustees; MARK BUYCK, officially as chair of USC's Academic Affairs Committee; THOMAS STEPP, individually and as Secretary of USC's Board of Trustees; ALTON McCoy, officially as USC's Internal Auditor; EDWARD VAUGHN, officially as South Carolina Auditor; MARGARET STILLWELL, officially as South Carolina Auditor; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; DOUGLASS BRYAN, officially as DHEC Commissioner; FOSTER YOUNG, officially as Deputy Commissioner of DHEC; JAMES PADGET, both individually and officially; ROBERT BALL, both individually and officially; JUDY WEEKS, both individually and officially; RUSS MCKINNEY, both individually and officially; WALTER PARHAM, both individually and officially; CLIFFORD SCOTT, both individually and officially; J. O'NEAL HUMPHRIES, both individually and officially; CAROLINE STROBEL, both individually and officially; LAWRENCE DARK, both individually and officially; JAMES EBERSOLE; ERNEST P. MCCUTCHEON; JOAN M. ALTEKRUSE; LAURA BIRD NOTTINGHAM; ERIC BRENNER; JAMES SEARS; MARSHA WELSH, both individually and officially; PATRICK BARRISSI, both individually and officially,

Defendants-Appellees,

and

ATTORNEY GENERAL FOR THE STATE OF NORTH CAROLINA; MARY SECHREST, both individually and officially; JOHN DOE, unknown person and private organizations in their individual capacities, *Defendants.*

Appeals from the United States District Court
for the District of South Carolina, at Columbia.
Joseph F. Anderson, Jr., Dennis W. Shedd, District Judges.
(CA-94-1578-3-17BC)

Submitted: October 20, 1998 Decided: November 16, 1998

Before HAMILTON, LUTTIG, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL Marie Assa'ad-Faltas, Appellant Pro Se. Susan Pedrick McWilliams Victoria LaMonte Eslinger, Elizabeth Ann Loadholt Felder, NEXSEN, PRUET, JACOBS & POLLARD, Columbia, South Carolina; Peter Robert Messitt, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Dr. Marie Therese Assa'ad-Faltas appeals the district court's dismissal of her civil action for abuse of the discovery process and the denial of her motions for reconsideration.

We have reviewed the record, the district court's opinions and orders, and all pleadings filed in this court and find no reversible error.

Assa'ad-Faltas's repeated failures to produce documents and comply with discovery orders, combined with her demeanor during her deposition, fully warranted the sanction of dismissal. *See Hillig v. Comsnr,* 916 F.2d 171, 174-75 (4th Cir. 1990); *Mutual Fed. Savs. & Loan Ass'n v. Richards & Assoc., Inc.,* 872 F.2d 88, 92 (4th Cir. 1989). Further, Assa'ad Faltas's motions for reconsideration were properly denied. *See United States v. Williams,* 674 F.2d 310, 313 (4th Cir. 1982). Accordingly we affirm the district court's orders.

We deny as moot Assa'ad-Faltas's motion for reconsideration of this court's denial of her motion to consolidate this case with the appeals in Nos. 96-2086 and 96-2177. *See Assa'ad-Faltas v. State Newspaper,* No. 96-2086 (4th Cir. July 16, 1998) (unpublished); *Assa'ad-Faltas v. Attorney General,* No. 96-2177 (4th Cir. Oct. 6, 1998) (unpublished). We decline Assa'ad-Faltas's request lo consider this appeal in banc. *See* Fed. R. App. P. 35; 4th Cir. Loc. R. 35(b). After the briefs were filed, Orin Briggs filed a notice of appearance for Assa'ad-Faltas for the purpose of participating in oral argument. However, we decline to hear oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT No. 96-2177

MARIE ASSA'AD-FALTAS, a/k/a Dr. Faltas, MD, MPH,

Plaintiff - Appellant,

versus

ATTORNEY GENERAL OF THE COMMONWEALTH OF VIRGINIA; CAROL NANCE, in her individual and official capacities; BOBBY GIST, in his individual capacity; DAVID SHERIDAN, in his individual capacity; PATRICK BARRESI, in his individual capacity; JUDY WEEKS, in her individual capacity; J. O'NEAL HUMPHRIES, in his individual capacity;LAWRENCE DARK, in his individual capacity; JOAN M. ALTEKRUSE, in her individual capacity; ERNEST ALTEKRUSE, in his individual capacity; RICHARD CRESWICK in his individual capacity; THE LAW FIRM OF NEXSEN, PRUET, JACOBS & POLLARD, LLP, in its corporate capacity; VICTORIA ESLINGER, in her individual capacity; SUSAN MCWILLIAMS, in her individual capacity; JOHN TRUSSEL, in his individual capacity; EDWARD TURBEVILLE, in his individual capacity,

Defendants - Appellees,

and

RANDALL CHASTAIN, in his individual capacity; THE STATE NEWSPAPER, in its corporate capacity; KATHERINE GRAY, individually and as agent of the State Newspaper; CLAUDIA SMITH BRINSON, individually and as agent of the State News paper; PATRICK BLANCHAT, individually and as agent of the State Newspaper; THOMAS MCLEAN, individually and as agent of the State News paper; WILLIAM RHONE, individually and as agent of the State Newspaper; CHRIS RILEY; UNKNOWN-NAMED DEFENDANTS,

Defendants.

MARIE ASSA'AD-FALTAS, a/k/a Dr. Faltas, MD, MPH, **No. 97-1272**

Plaintiff - Appellant,

versus

ATTORNEY GENERAL OF THE COMMONWEALTH OF VIRGINIA; CAROL NANCE, in her individual and official capacities; BOBBY GIST, in his individual capacity; DAVID SHERIDAN, in-his individual capacity; PATRICK BARRESI, in his individual capacity; JUDY WEEKS, in her individual capacity; J. O'NEAL HUMPHRIES, in his individual capacity; LAWRENCE DARK, in his individual capacity; JOAN M. ALTEKRUSE, in her individual capacity; ERNEST ALTEKRUSE, in his individual capacity; RICHARD CRESWICK, in his individual capacity; THE LAW FIRM OF NEXSEN, PRUET, JACOBS & POLLARD, LLP, in its corporate capacity; VICTORIA ESLINGER, in her individual capacity; SUSAN MCWILLIAMS, in her individual capacity; JOHN TRUSSELL, in his individual capacity; EDWARD TURBEVILLE, in his individual capacity,

Defendants - Appellees,

RANDALL CHASTAIN, in his individual capacity; THE STATE NEWSPAPER, in its corporate capacity; KATHERINE GRAY, individually and as agent of the State Newspaper; CLAUDIA SMITH BRINSON, individually and as agent of the State News paper; PATRICK BLANCHAT, individually and as agent of the State Newspaper; THOMAS MCLEAN, individually and as agent of the State News paper; WILLIAM RHONE, individually and as agent of the State Newspaper; CHRIS RILEY; UNKNOWN NAMED DEFENDANTS,

Defendants.

Appeals from the United States District Court
for the District of South Carolina, at Columbia.
Joseph F. Anderson, Jr.; Dennis W. Shedd, District Judges.
(CA-95-1521-3-17)

Submitted: September 22, 1998 **Decided: October 6, 1998**

Before HAMILTON, LUTTIG, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Marie Assa'ad-Faltas, Appellant Pro Se. Peter Robert Messitt, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia; Susan Pedrick McWilliams, Victoria LaMonte Eslinger, Elizabeth Ann Loadholt Felder, NEXSEN, PRUET, JACOBS & POLLARD, Columbia, South Carolina, for Appellees.
Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:
Dr. Marie Therese Assa'ad Faltas appeals the district court's orders dismissing her civil action for abuse of the discovery process, denying her motions to reconsider, and granting sanctions to the Defendants under FRCP 11. We have reviewed the record, the district court's opinions and orders, and all of the pleadings filed in this court and find no reversible error. Assa'ad Faltas's failure to return to her deposition without permission of the special master, combined with her refusal to cooperate with discovery throughout the proceedings, warranted dismissal of the action. FRCP 37(d); Mutual Fed. Savs. & Loan Ass'n v Richards & Assoc., 872 F.2d 88, 92 (4th Cir. 1989). Further, Assa'ad Faltas's motions for reconsideration were properly denied. United States v. Williams, 674 F.2d 310, 313 (4th Cir 1982).

Finally, the district court did not abuse its discretion in awarding sanctions under Rule 11 based on Assa'ad Faltas's pursuit of untenable and patently meritless claims. See In re Kunstler, 914 F.2d 505, 518 (4th Cir. 1990). Accordingly, we affirm on the reasoning of the district court. Assa'ad Faltas v. Attorney Gen., No. CA-95-1521-3-17 (D.S.C. July 23, 1996; Jan. 17, 1997).We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not significantly aid the decisional process. AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED November 23, 1998
No. 96-2177

MARIE ASSA'AD-FALTAS, a/k/a Dr. Faltas, MD, MPH CA-95-1521-3-17
Plaintiff - Appellant

v.

ATTORNEY GENERAL OF THE COMMONWEALTH OF VIRGINIA; CAROL NANCE, in her individual and official capacities; BOBBY GIST, in his individual capacity; DAVID SHERIDAN, in his individual capacity; PATRICK BARRESI, in his individual capacity; JUDY WEEKS, in her individual capacity; J. O'NEAL HUMPHRIES, in his individual capacity; LAWRENCE DARK, in his individual capacity; JOAN M. ALTEKRUSE, in her individual capacity; ERNEST

ALTEKRUSE, in his individual capacity; RICHARD CRESWICK, in his individual capacity; THE LAW FIRM OF NEXSEN, PRUET, JACOBS & POLLARD, LLP, in its corporate capacity; VICTORIA ESLINGER, in her individual capacity; SUSAN MCWILLIAMS, in her individual capacity; JOHN TRUSSELL, in his individual capacity; EDWARD TURBEVILLE, in his individual capacity

Defendants - Appellees

and

RANDALL CHASTAIN, in his individual capacity; THE STATE NEWSPAPER, in its corporate capacity; KATHERINE GRAY, individually and as agent of the State Newspaper; CLAUDIA SMITH BRINSON, individually and as agent of the State Newspaper; PATRICK BLANCHAT, individually and as agent of the State Newspaper; THOMAS MCLEAN, individually and as agent of the State Newspaper; WILLIAM RHONE, individually and as agent of the State Newspaper; CHRIS RILEY; UNKNOWN NAMED DEFENDANTS, **Defendants**

No. 97-1272

MARIE ASSA'AD-FALTAS, a/k/a Dr. Faltas, MD, MPH CA-95-1521-3-17

Plaintiff - Appellant

v.

ATTORNEY GENERAL OF THE COMMONWEALTH OF VIRGINIA; CAROL NANCE, in her individual and official capacities; BOBBY GIST, in his individual capacity; DAVID SHERIDAN, in his individual capacity; PATRICK BARRESI, in his individual capacity; JUDY WEEKS, in her individual capacity; J. O'NEAL HUMPHRIES, in his individual capacity; LAWRENCE DARK, in his individual capacity; JOAN M. ALTEKRUSE, in her individual capacity; ERNEST ALTEKRUSE, in his individual capacity; RICHARD CRESWICK, in his individual capacity; THE LAW FIRM OF NEXSEN, PRUET, JACOBS & POLLARD, LLP, in its corporate capacity; VICTORIA ESLINGER, in her individual capacity; SUSAN MCWILLIAMS, in her individual capacity; JOHN TRUSSELL, in his individual capacity; EDWARD TURBEVILLE, in his individual capacity

Defendants - Appellees

and

RANDALL CHASTAIN, in his individual capacity; THE STATE NEWSPAPER, in its corporate capacity; KATHERINE GRAY, individually and as agent of the State Newspaper; CLAUDIA SMITH BRINSON, individually and as agent of the State Newspaper; PATRICK BLANCHAT, individually and as agent of the State Newspaper; THOMAS MCLEAN, individually and as agent of the State Newspaper; WILLIAM RHONE, individually and as agent of the State Newspaper; CHRIS RILEY; UNKNOWN NAMED DEFENDANTS **Defendants**

On Petition for Rehearing
with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehealing in banc are denied.

For the Court,
/s/ Patricia S. Connor
CLERK

FILED **LARRY W. PROPES. CLERK**
JULY 11 1996 **Columbia, S.C.**

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Soraya F. Fares and Marie-Thérèse Assa'ad-Faltas, MD, MPH [hereinafter "Dr. Faltas"], Plaintiffs,
v. C/A No.: 3:94-1578-17
The University of South Carolina [hereinafter "USC"] et al., Defendants.

ORDER ON PLAINTIFF'S' MOTION FOR RECONSIDERATION

This matter is before the court on plaintiff' s motion for reconsideration of this court's order dismissing the present action. That order adopted the Magistrate Judge's recommendation that this action be dismissed for abuse of the discovery process and willful misrepresentations to the court. *See* Order filed March 18, 1996 (Order of Dismissal"); Motion filed April 8, 1996.

*****

The court hereby amends its prior reference to plaintiff's litigation history found at pages 5 - 6 (note 2) in the Order of Dismissal, to include the above referenced matter. Given the reason for the court's discussion of plaintiff's litigation history, this requires no further modification of the original order.

Supplementation of Record
Plaintiff also asks the court to supplement the record to include two letters which were previously submitted to this court for *in camera* review. These include: a January 4, 1994 letter from Walter Parham to Edward Turbeville; and an October 27, 1993 letter from Victoria Eslinger to a representative of the University of South Carolina.

The court finds this request to be reasonable and, therefore, will require defendants to submit these documents, under seal, for whatever future review of this matter may be had.[4]

CONCLUSION

For the reasons stated herein, plaintiff's motion for reconsideration is denied except to the extent that the court amends its recitation of plaintiff's litigation history to include the matter listed above and directs defendants to file, under seal, the two letters referenced above.This matter is, therefore, dismissed with prejudice for the reasons stated in the court's order of March 18, 1996 as further explained above.

IT IS SO ORDERED.

S/Joseph F. Anderson, Jr.
United States District Judge

July 11, 1996
Columbia, South Carolina

FILED **LARRY W. PROPES. CLERK**
AUGUST 1 6 1996 **COLUMBIA. S. C.**

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Marie-Therese Assa'ad-Faltas, MD, MPH,
Plaintiff,

v. C/A No.: 3:95-1521-17

The Attorney General of Virginia, *et al.*,
Defendants.

SUBSTITUTED ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND

Before the court is plaintiff's motion to alter or amend the judgment in this case. Underlying this motion is a request that the court reverse its earlier orders discussing various defendants and claims, reverse its award of sanctions, and reverse its dismissal on grounds of discovery abuse. Also before the court are a variety of related motions or submissions. For the reasons discussed below, the court denies plaintiff's motion to alter and amend.

****

" in a jail cell") to gain plaintiff's compliance with the special master's orders. Plaintiff was well aware that this was no more than a suggestion which was at best unlikely to result and certainly could not have occurred without a prior hearing.

4 This court recalls that these letters were submitted for review in a related case, not this case. Nonetheless, the court directs that they be made part of the record in the present case, to be filed and maintained under seal absent further order of this court.

As the special master advised plaintiff, he had the power to *recommend* sanctions. In any case a fear that the court might impose incarceration as a sanction for contempt would not justify fight. Otherwise, every criminal defendant could justify the same.

****

For all of the above reasons, this court finds no reason to modify its prior ruling based on some later offered speculative "guilt trip" that plaintiff would like to conduct for the court.

II. THE PROPRIETY OF THE EARLIER RULE 11 SANCTIONS.

Plaintiff argues in one of the document filed August 2, 1996, as well as in an August 6, 1996 submission, that the court improperly imposed monetary sanctions for Rule 11 violations on her because she is immune from liability for legal arguments made by her lawyer in the complaint.[9] The court will address this argument although plaintiff did not raise it at the appropriate time (when the sanctions were under consideration or in the earlier motion(s) to reconsider imposition of sanctions or the dismissal motions on which they were based. The specific provision on which plaintiff relies reads follows:

---

9 This action was initially filed by counsel. The court granted counsel's request for the matter to proceed in forma pauperis. Within forty-five days thereafter, plaintiff sought to consolidate this case with another within which she was proceeding pro se and sought to be allowed to sign pleadings in the proposed combined action on her own. The court denied this motion. Immediately thereafter, plaintiff's attorney sought to be relieved as counsel. Notably, this is the first document which appears to have actually been prepared by counsel (different type style, double spaced). This motion was granted. In the interim between when counsel filed his motion to be relieved (July 7, 1995) and the date the court granted this request, counsel continued to sign all documents but they appear from form and type style to have been prepared by plaintiff. After August 24, 1995, plaintiff appears to have signed all pleadings including a combined response to all defendant's dispositive motions (which was filed on September 21, 1995. She filed a second memorandum of the same nature on September 28, 1996. Her former attorney filed some subsequent documents but only regarding sanctions motions which were asserted, in part, against him. In addition, plaintiff argued the dismissal motions orally before this court and essentially reargued them in the Rule 11 proceedings. See generally, Documents signed by plaintiff filed September 28 and October 30,1995 (Opposition to Rule 11 motions). November 2, 1995 (motion to reopen summary judgment for one defendant), December 6 and 26, 1995 (opposing one Rule 11 motion and arguing for reconsideration of imposition of Rule 11 sanctions against plaintiff and her attorney). While plaintiff's arguments against Rule 11 sanctions are not themselves the basis for imposing sanctions, they provide a written record (in addition to the hearing transcripts of plaintiff's continued advancement of the legal positions advanced in the complaint.

"Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2)." Subdivision (b)(2) requires that "claims, defenses, and other legal contentions [in a signed filed document, or later advocacy] are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. P. 11(b)(2). Plaintiff's reliance on this subsection are misplaced for several reasons. First, although plaintiff was represented at the time the complaint was filed, she was not represented when she later continued to vigorously advance the claims in the complaint both in oral argument and in written opposition to the defendants' dispositive motions. Plaintiff's advancement of the claims included, in some instances, motions for reconsideration filed after the court's dismissal of various claims and imposition of sanctions. Later advocacy is an independent basis for the imposition of sanctions as noted in the initial paragraph of subsection (b).[10] Second, the imposition of sanctions against plaintiff was, at least in part, based on certain of her factual assertions which proved to have no foundation whatsoever. Rule 11(c)(2)(A) has no applicability to factual assertions.

Most of the remaining arguments regarding Rule 11 have been fully addressed in prior orders or simply justify no response. The court will, however clarify the reason it did not impose sanctions in favor of Ms. Eslinger as to all claims but did as to her law firm. First, the court did award sanctions in favor of Ms. Eslinger, although not on one of the claims asserted against her. While that last claim was ultimately dismissed on summary judgment motion, the court found that the assertion of it did not rise to the level of sanctionable conduct. By contrast, there were a number of claims asserted against Ms. Eslinger and her employer as this court read the complaint, both for Ms. Eslinger's conduct and conduct of others).[11]As to all these claims except the one referenced above, the court dismissed the claims on Rule 12(b)(6) or Rule 56 grounds and found the assertion of the claims sanctionable. The fees awarded to Ms. Eslinger's employer were based on the claims for which it was independently dismissed. It would have no expenses as *respondeat superior* under the one remaining claim against Ms. Eslinger other than Ms. Eslinger's defense fees which were, as noted above, denied as to this one claim. **********

10 Although the court will not rely on this, it notes that the complaint was clearly drafted by plaintiff who then convinced her attorney to sign the complaint.

11 Plaintiff has since suggested that defendants and the court read her complaint too broadly. If so, the time for plaintiff to clarify the limited basis of the claims she was asserting was when faced with the first motion, argument, or document indicating a misunderstanding by the court or defendants. Quite the contrary, plaintiff only suggested this narrowing when the Rule 11 sanctions were raised.

Plaintiff also argues that the court had a duty to dismiss her claims under 28 U.S.C. §1915(d), if at all, and that because the claims were not dismissed prior to service, the court is precluded from imposing Rule 11 sanctions. Such an interpretation would turn a tool available to courts to protect defendants from frivolous claims into a shield to protect the filers of frivolous claims. Clearly, that is not the intent of this rule. Plaintiff's interpretation would, moreover, seriously impair significant due process rights of the defendants. It would also impose an incredible burden on the courts, deny the court the advantage of briefing by the parties when that would be helpful, and delay the service of most *in forma pauperis* complaints.

Not only is this court confident that none of these results was intended by Section 1915(d), but it is confident that plaintiff knows it. Clearly she did not raise this argument at any earlier time despite her clear familiarity with the *in forma pauperis* provisions. For the reasons discussed above, the court finds no reason to modify its decision to impose Rule 11 sanctions.

III. THE COURT'S DISMISSAL OF VARIOUS DEFENDANT'S AND CLAIMS ON RULE 12(B)(6) AND 56 GROUNDS.

Plaintiff challenges the court's earlier dismissal of various claims and defendants under Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure. The reasons for these dismissals were set out in various earlier orders, most of which were issued at least six or more months before the present motion. Plaintiff has also reargued some or all of these motions in one form or another. This court will not, therefore revisit these issues except the few points addressed below. Plaintiff again argues, as in the submission discussed immediately above, that once the complaint passed § 1915(d) muster, the court could not, on its own, raise a question as to the viability of a claim. Specifically, plaintiff seems to be referring to the court's various *sua Sponte* orders of dismissal of various claims. The court does not see why, if it has authority to dismiss claims under 1915(d) before service, it cannot raise the same concerns later when it has had an opportunity to delve into the complaint and sort out the large number of overlapping claims to determine which are viable. In the present case, the court dismissed a number of claims relating to parties who had not yet appeared which claims duplicated others the court had dismissed as to other parties on the same grounds Certainly it was in the interest of judicial economy to do so.

*****

CONCLUSION

For the reasons discussed above, this court denies plaintiff s motion to alter or amend the judgment.

IT IS SO ORDERED

S/Joseph F. Anderson, Jr.
United States District Judge

August 14, 1996
Columbia, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Soraya F. Fares and Marie-Thérèse Assa'ad-Faltas, MD, MPH Plaintiff,
v. C/A No.: 3:94-1578-19
The University of South Carolina [hereinafter "USC"] *et al.* Defendants.

Marie-Thérèse Assa'ad-Faltas, MD, MPH
Plaintiff,)
v. C/A No.: 3:95 - 1521 - 19
The Attorney General of Virginia; *et al.*,
Defendants.)

PLAINTIFF'S RULE 60(b) MOTION TO SET ASIDE THE JUDGMENT
ON ALL HER CLAIMS AGAINST ALL DEFENDANTS
AND TO ENTER JUDGMENT FOR HER
BASED ON NEWLY-DISCOVERED EVIDENCE
HAT COMPELS THIS RESULT
(ORIGINAL FILED 25 NOVEMBER 1996)

Stamped/DENIED
1/16/97
Signed/Dennis W. Shedd
United States District Judge

FILED JANUARY 16 1997
LARRY W. PROPES, CLERK
COLUMBIA, S.C

PREVENTIVE MEDICINE

FACULTY APPLICANT INTERVIEW EVALUATION

APPLICANT: *Dr. Marie Faltas* EVALUATOR: *IMA* INTERVIEW DATE: *5-3-91*

CONSIDERATIONS:

1. Appearance articulates ideas relates to you *Distinguished, Poised. Personable, Excellent use of the language in relating and expressing complex ideas. Accent but with acceptable vocal usage.*
2. Range of knowledge and ideas; clarity of reasoning; awareness of deficits; language facility. *Thoughtful, experienced, logical (left brained)*
3. Realistic perception of own personal and professional goals, societal and community concerns, (investment in family) *not discussed Mature notions of Prev med & good alignment of skills with objectives.*
4. Active interest in extra-medical matters; breadth of interest; joie de vivre. *good sense of humor*
5. Adequate support system—parents, spouse, etc. *Presumably (I have no c.v. or background info.)*
6. Community involvements, past employments, leadership positions. *Frequent moves; some related to health, licensure, fellowship & assistanceship termination & with capabilities which exceeded the jobs in P.H. which she held.*
8. Orientation toward region, state, institution. *OK: Knows N.C. well (1st there in 1979). Candidate's mother is citizen resident of N.C.*
9. Academic strengths—grades. *Intellectually superior.*
10. Honors; professional recommendations. *Fulbright fellowship from Egypt to US - 1979; very competitive*

STRENGTHS: *Advanced prof. knowledge & status*

WEAKNESSES: *Tendency to change employment often. (See above re possibly mitigating circumstances). We are only expecting a year (Practicum) stay, so this is not likely to be an issue.*

COMMENTS: *This applicant is more like the "mid-career" residents that brought richness to the program in past years. I feel that her contributions would be significant & her continued profession practice in Prev Med is extremely promising. Advise acceptance.*

What effect do you think applicant would have on fellow faculty, patients and programs? *(+)*

Please rate this faculty candidate in each of the areas a faculty member must fulfill: *Not applicable but good probability of productive work in these areas.(Certainly competitive with some faculty candidates)*

APPLICANT RATING SCALE *8. Superior candidate—would be a real asset to our department.*

Special note: I spoke to Sec/Treas ABPM about adequacy of her clinical year. IF she has a license in a state within the US, the Bd will be likely to view the clin. requirement as met.

.....EVALUATOR: *JMA*

Resident ~~FACULTY~~ APPLICANT INTERVIEW EVALUATION

APPLICANT: *Faltas, Marie* EVALUATOR: *E. McCutcheon* DATE: *5/3/91*

CONSIDERATIONS:

2. Range of knowledge and ideas; clarity of reasoning; awareness of deficits; language facility. *Some accent, but intelligible and articulate*
3. Realistic perception of own personal and professional goals, societal and community concerns, investment in family. *Uncertain cultural differences prevent adequate assessment; superficially satisfactory. Articulates wide range of experiences*
4. Active interest in extra-medical matters; breadth of interest; joie de vivre. *struggling & persisting to find entry into preventive medicine — "paying her dues"*
6. Community involvements, past employments, leadership positions. *Has worked in Va health dept. but not a good experience*
7. Orientation towards preventive medicine. *STRONG*
8. Orientation toward region, state, institution. *mother is NC (and US) resident*
9. Academic strengths—grades. *High*
10. Honors; professional recommendations. *Dr Tyroler's letter is relatively unenthusiastic; she did not publish her MPH thesis work*

STRENGTHS: *Excellent vocabulary in English*
MPH + at first-class institution/program

WEAKNESSES: *Direct patient care experience limited, did not perform satisfactorily at Anderson program (personal comm.) letter stated "half a year" of primary care residency, actually only 4 months (2 @ Anderson, 2 @ Meharry)(+2 yrs in path[ology].)*

COMMENTS: *Strongest applicant in pool. Not fully satisfied with her reasons for withdrawal from the Path[ology] residency—states it was because of potential infectious hazards to her health*

What effect do you think applicant would have on fellow faculty, patients and programs? *Generally positive—cultural gap may be problem with SC patients from non-professional background*

Please rate this ~~faculty~~ *resident* candidate in each of the areas a faculty member must fulfill: Research Z Teaching Z Service Z Overall Z

7. Very good candidate but has one area of concern (specify) *Cultural gap*

EVALUATOR: *E. McCutcheon*.....

CONFIDENTIAL MEMORANDUM

TO: Dr. Ernest P. McCutcheon
Preventive Medicine Residency Director
FROM: Dr. Joan M. Altekruse [i/JMA]
RE: Dr. Marie Faltas Preventive Medicine Resident
DATE: April 12, 1993

I want to bring to your attention attitudes and behaviors of Dr. Faltas which cause concern. She came to my office to object to my effort to ascertain the activities she is engaging in to fulfill the requirements of the Practicum year. She suggested that my inquiries might represent "reprisal" (her word) due to our differences of opinion on subjects unrelated to her professional activities here. She asserted that such "micro pedagogic" (her words) monitoring was inappropriate and excessive, especially given her age and the duration of her professional experience.

She claimed that faculty disinterest in residents accounted for difficulties of three recent graduates in locating post-residency employment and that genuine interest on my part would be better employed in placement efforts. My responses emphasized that faculty priorities were to assure the quality of the Practicum and to evaluate residents' work on "time/effort" as well as "product delivery". Faculty responsibilities and evidence of interest in residents' career development may relate to subsequent placement, but are not a primary function. I also suggested that her sample of immediate "disastrous" employment outcomes was poorly drawn and her interpretations in error. (Her references were to three program graduates—two of whom have special requirements, such as limited job mobility and family responsibilities. The third is well placed professionally, but was disappointed in not being accepted into an intensely competitive program.) Dr. Faltas "data" is shy on figures for the denominator of the population she describes and not reflective of the general experiences of the program or its residents.

It became increasingly evident to me that serious attempts to deal with her objections only opened up additional expressions of dissatisfaction and of accusations on her part. For example, she asserted that I had failed to provide her with connections to political figures who would enhance her work and her success in placement for next year. If she were merely demonstrating anxiety about the next phase of her career, I would (and still feel) empathetic and willing to assist. However, her demands are exaggerated, even extreme, as is her sense of being aggrieved. She tends to introduce extraneous issue, such as discrimination against her as a foreigner and a female. Those perceptions might have merit, but, in my view, not nearly to the degree she imputes to them.

Instead they appear to be a strategy to get sympathetic attention. However, when presented in an overly accusatory manner which misconstrues the motives and objects to the supervisory functions, they become problematic for faculty and dysfunctional for her. Part of my concern is that if we ignore her present deportment, it may grow more idiosyncratic and self-re-enforcing. She needs to learn more about working within an organization in ways that do not imperil the regular and enduring employment status that she needs, wants and has been unable to secure in some previous work settings.

Please let me now when the Residency Advisory Committee will meet to continue our process of evaluation and feedback to residents. Those mechanisms, based on faculty monitoring are effective means to assure the quality of our Practicum and of residents' preparation for their future work, Dr. Faltas' views not withstanding.

THE UNIVERSITY OF SOUTH CAROLINA

School of Medicine PREVENTIVE MEDICINE 803-733-3306

April 29, 1993

Mr. Paul A. Williams
Brocker Health Center, UNC- Charlotte
Charlotte, NC 28223

Re: Reference letter for Marie Assad-Faltas, MD, MPH

Dear Mr. Williams:

This letter is intended to summarize the content of our Preventive Medicine residency program and to convey the competencies which Dr. Assad-Faltas has acquired and improved as a resident in the second year of our program. As you may know, the PM residency requires a clinical year in any primary care field, which is followed by a two year program of academic and supervised clinical work. After completing her pre-clinical training in Egypt in 1977, Dr. Assad-Faltas performed graduate training in the US, completing two years of a pathology residency at the University of Illinois at Chicago in 1986, and a year of Family Practice training through a combination of rotations at Anderson Memorial Hospital (1990), Meharry Hubbard Hospital (1990-91), Baptist Memorial Hospital in Winston-Salem (1991), and Richland Memorial Hospital in Columbia (1992). Also relevant was her work as a health director in Virginia, where she qualified for a medical license. The first or academic year requirement for the PM residency can be met by obtaining an MPH, which she received from the University of North Carolina in 1982. Dr. Assad-Faltas is projected to complete the second year of the PM program on June 30, 1993; after a year of practice in the field of PM, she would be eligible to apply for examination by the American Board of Preventive Medicine. In our program, she has extensive experience in our PM ambulatory care clinics.

These clinics include a wide variety of patients, ranging from issues of lifestyle change such as cigarette smoking and lack of exercise through pharmacological management of hypertension and sexually transmitted diseases. As part of this activity, she developed a new patient handout on reducing the risk of melanoma which we are using routinely. Other rotations include Health and Safety, SC health department (Department of Health and Environmental Control), and multi-disciplinary medical-industrial sites (Savannah River Plant and Fort Jackson). Her evaluations have been generally satisfactory. ***She is an inquisitive and able clinician in these settings.***

Additional activities include attendance at several national and regional meetings, and development of projects in health policy and evaluation of the outcomes for patients receiving care in our VA ambulatory care clinic. *In conclusion, I would expect that the breadth and depth of her medical expertise would qualify her for work as a physician in a student health center, particularly considering the importance of health promotion and disease prevention in that setting.*

Please feel free to call me if you need additional information. My number is 803-434-6116.

Sincerely yours,
s/ Ernest P. McCutcheon, MD, MPH
Associate Professor and Preventive Medicine Residency Director
Department of Family and Preventive Medicine.

MEMORANDUM

TO: Dr. Ernest P. McCutcheon
Director, Preventive Medicine Residency Program

FROM: Dr. Joan M. Altekruse initialed/*JMA*
Professor of Preventive Medicine

DATE: May 27, 1993

RE: Recommendation for Dismissal of Dr. Marie Faltas from the Preventive Medicine Residency

Since the meeting of the Residency Admission and Evaluation Committee (May 13, 1993), I have had an opportunity to review the tape of that session and the letter to Dr. Faltas which contains the recommendations of that committee regarding her present status and the requirements she must meet to complete the Practicum Year.

I have declined to sign that letter because I find the terms too lenient given Dr. Faltas' inadequate and inappropriate performance in the Practicum Year. Instead I favor termination of her status as a temporary employee and resident as promptly as due process requirements applicable to resident dismissal will allow.

That action is consistent with procedures defined by S.C. Dept. of Human Resources, the VA and internal regulations of the Residency program. My recommendation is based on the following examples of Dr. Faltas' behavior during the course of her training here:

- Failure to make satisfactory progress toward completion of her primary Practicum project within the period prescribed for that purpose.
- Refusal to cooperate with faculty and the standing committee charged with resident evaluation. (Please refer to tape of committee noted above).
- Abusive and disruptive behavior directed toward clerical staff, administrative employees and faculty within the Division of Preventive Medicine, as well as toward persons beyond her immediate academic environment.

In the course of the year her problems with managing interpersonal relationships have escalated. Apparent self-confidence has changed to arrogant contentiousness, incivility, loud aggressive outbursts and, recently, fabrications of discriminatory treatment. They have acquired a level of routine unacceptability. Recently she has made unwarranted accusations against co-workers. During the year Dr. Faltas' presence has generated social stress among many of her associates and has consumed excessive time to handle the exaggerated claims and demands she has imposed on staff, faculty and Division resources. *She has rejected verbal correction and written complaints about her behavior. In fact she has countered such efforts with allegations of harassment on the grounds of ethnic, national, gender and disability discrimination.* (Initial informal review of the latter claim to the Executive Assistant to the President of USC for Equal Opportunity Programs found her request to lack merit).

Disagreement with positions she espouses arouses extreme negativity toward the person presenting a view that conflicts with Dr. Faltas' beliefs. An expanding number of subjects have produced this reaction, ranging from the interpretation of data on ***sexual orientation***, ***creationism*** *and estimating her own expert status. Colleagues in affiliated programs, individuals in the community; in other units of the University, other state and academic institutions have declined further association with her because of the attitude of intolerance,* ***judgmental certainty***, *condescending authoritarianism, and* ***moral superiority*** *which she feels entitled to express. These events damage the residency program and the good will which we have striven to develop among colleagues. (Please note the tape of a radio broadcast presented by S.C. Educational Radio on May 13, 1993, and the article Dr. Faltas authored for* <u>*The State*</u> *newspaper. Both demonstrate her grandiose self-assessment, anger at contradicting evidence, and disdain for those who offer it).*

Conscientious efforts by several members of the faculty who have repeatedly sought to advise her have been rebuffed. In fact, serious discourse is now essentially infeasible due to her adversarial and aggressive verbal behavior. She deflects substantive issues regarding her activities with legalistic stratagems (I am not obligated to answer to this Committee) and non-pertinent procedural challenges When was the last time this committee met?) [Please hear the Committee meeting tapes of May 13, 1993. They convey far better than my words the degree of her departure from acceptable collegial interaction.] Numerous examples illustrate extraordinary efforts by would-be mentors here to serve her interests, assist her professional advancement and accommodate her personal convenience. Her responses have been to discount and dismiss those actions, or worse, to radically misconstrue them as either inadequate to the entitlements she rightfully commands or intentionally damaging to her.

The difficulties presented by Dr. Faltas represent extremes that I have not encountered during my years of experience with residents. I have given much consideration to measures to normalize Dr. Faltas' performance and to increase her own levels of security and satisfaction. Without pretending to delve into psychological attributes which might explain her interpersonal difficulties, I can, nevertheless, empathize with the personal pain and discomfort she must feel secondary to her failed relationships and worsening professional performance. It has occurred to me that her behavior may be a call for help. Yet her lack of insight and denial of her role as a contributor to the problems that surround her leave us with few effective ways to assist. In addition to angry rejection of what we, as faculty, have attempted to offer, she adamantly refuses to obtain the professional counseling that has been formally recommended to her.

Until Dr. Faltas recognizes that legitimately assigned responsibilities cannot be shrugged off, that self-made claims of superior intellect and authority do not substitute for adequate performance, that civility and respect are necessary parts of professional socialization and interaction, that colleagues must not cater to forcefully expressed whims and intimidation, she is not, in my view, a candidate for successful completion of this or any other graduate medical educational program. Under the present conditions I feel obligated, according to my belief that such action embodies fairness, to recommend that Dr. Faltas be dismissed. This is a sad and onerous duty, and in sharp contrast to my earlier expectations for her success in our program. I believe that to equivocate on this decision, particularly on the pragmatic grounds that she will soon leave the residency, is a failure of faculty responsibility to evaluate fairly and accurately and to take action in accordance with those findings.

To ignore her serious shortcomings would be a breach of the special trust that the public confers on educators. It is my firm conviction that endorsing her performance as acceptable or her training experience as a successful fulfillment of the Practicum year of the Preventive Medicine Residency would be a disservice to the public, the specialty, the standing of the University of South Carolina the residency and, arguably, to Dr. Faltas' long term professional functioning.

UNIVERSITY OF SOUTH CAROLINA

SCHOOL OF MEDICINE **May 28, 1993**

Dear Dr. Faltas:

The Residency Director and the Admissions and Evaluation Committee met today to review your communication of May 24, 1993, in response to our letter of May 21, 1993. After thorough discussion, we reached the following conclusions:

1. We urge you to seek the professional counseling we recommended previously. Your recent actions (including an absence for illness) indicate your need for such help may be increasing and you should proceed quickly to obtain that assistance.
2. In recognition of the above, you are suspended immediately from your duties and responsibilities as a resident and from access to the resources of the department. Your pay will continue until June 30 as previously agreed. You are required to remove any personal items and turn in all School of Medicine keys and library photocopy card immediately.
3. The final decision regarding your status in the program, which may include reinstatement or termination as possible outcomes, will be reached within the next 10 days and you will be notified of our decision regarding your status as resident.

Sincerely yours,

s/Ernest P. McCutcheon, MD, MPH

Director, Preventive Medicine Residency Program

c: James Ebersole, Chair, Department of Family and Preventive Medicine

J. O'Neal Humphries, Dean, School of Medicine

Lawrence Dark, JD, Executive Assistant to the President for Equal Opportunity Programs

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FROM: DIVISION NUMBER TO:USC LEGAL DEPT JUNE 9 1993 8:48 AM

Mr. Clifford Scott, Associate General Counsel

Dear Mr. Scott

This is a request that you consider delaying "signing off" on terms for a "resolution" in the case of Dr. Marie Faltas until additional pertinent materials are obtained. Items expected here within 1-3 days are expected to detail her extensive involvement in litigation procedures & clarify her Immigration status.

Since the referenced information may influence a decision on her retention or dismissal from the medical training program for specialists, I urge you to avoid closure on current agreement which may be based on partial knowledge of relevant facts.

Yours truly,

Joan M. Altekruse, M.D., Dr.P.H.

Professor of Preventive Medicine, USC School of Medicine

c/Dr. Ebersole

Dr. McCutcheon tele: 733-3316

SOURCES OF INFORMATION REGARDING MARE FALTAS

Social Security No. 241 0682

= Ms. Mary P. Sechriest (919) 962-3031
UNC-Chapel Hill Legal Department
Special Assistant to the Chancellor
- Provided verbal review of litigation involving Marie Faltas.
- Marie Faltas sought to have University attorney disbarred. Judge's reprimand regarding "hundreds of court staff hours on Marie Faltas' case".
- Large file mailed here, June 9, 1993.
- FAXED two case discussions (appended)

= Ms. Carol Nance, Attorney General's Office, Richmond, Virginia (804) 786-1021 Referred to Marie Faltas' multiple suits regarding "discrimination" (on various grounds), "sexual harassment", "personal distress". Cases (under various names?) in at least three states (Arkansas, Virginia, North Carolina); to state and federal courts, appellate courts and U.S. Supreme Court. Named as defendants: universities (3), employers, individuals.
- Marie Faltas allegedly misrepresented herself to Virginia Board of Medical Examiners where she obtained a full medical license. Was allowed to leave the sate without revocation.
- Advised review of Marie Faltas' immigration status: maybe technical!y unemployable. Was on an exclusion order. Allowed back in "on parole". Check on denial of temporary application July, 1992. "The entire state has learned from this woman" regarding reference requirements.

= Mr. Frank Gary Charleston, S. C.
U.S. Immigration Office (803) 727-4422 (direct line)
- Has located 4 identification numbers 3 case files (These are irregular arrangements)
- Charlotte is merging the data now.
One file is in deportation procedures
..He will attempt to find out why ASAP (June 10, 1993)

USC SCHOOL OF MEDICINE RESIDENCY PROGRAM
IN PREVENTIVE MEDICINE
ADMISSIONS AND EVALUATION COMMITTEE

Record of Meeting of June 10, 1993 10:30 am - 12:00 noon

Committee Members Present: Drs. Joan Altekruse, Ernest McCutcheon, and David Sheridan

Other Faculty Present: Drs. Suzanne McDermott and Anbesaw Selassie

Absent Dr. Phillip Stone

1. Issues related to the status of Marie Assaad-Faltas were reviewed in detail.
2. The members of the Admissions and Evaluation Committee (Altekruse, McCutcheon and Sheridan) moved that Marie Assaad-Faltas be dismissed from the program because of
   1) failure to maintain a satisfactory level o academic performance or field training (item 4 of grounds for termination),
   2) failure to follow the rules, policies, and procedures prescribed for residents (item 5 of grounds for termination),
   3) failure to adhere to professional standards consistent with the judgment and behavior appropriate to a physician (item 1 of grounds for termination).
3. The committee members passed the motion unanimously and the other faculty also concurred; Dr. Faltas is to be dismissed from the program; documentation relating to this decision is attached.
4. The Residency Director is to forward this recommendation to the Department Chair.
5. The next meeting will be scheduled as necessary at the call of the chair.

Prepared by Ernest McCutcheon, MD, MPH
Residency Director and Chair, Admissions and Evaluation Committee

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UNIVERSITY OF SOUTH CAROLINA

SCHOOL OF MEDICINE Department of Pediatrics

September 3, 1 993

David Keisler, M.D., Interim Chairman
Department of Family and Preventive Medicine

Dear Doctor Keisler:

The ad hoc Appeals Committee appointed by Dean Humphries to hear Dr. Marie Faltas' appeal of your department's decision to dismiss her from the Preventive Medicine Residency Program convened on Friday, September 3, 1993. In attendance were: Drs. Lindsie Cone, Warren Derrick, and Nancy Richeson, Committee members; Dr. Marie Faltas; Mr. Clifford Scott, Associate General Counsel, USC; and Mr. James A. Merritt, Jr., Counsel for Dr. Faltas. The 21/2 hour session was audiotaped.

After reviewing the written information made available to the Committee and after considering the information supplied by Dr. Faltas during the hearing, the committee unanimously recommends that Dr. Faltas be reinstated as a resident in good standing in the Preventive Medicine Residency Program. This decision was based on a lack of clear and compelling documentation of the charges for dismissal. If you require elaboration of our findings, the committee will be happy to meet with you at your convenience.

For the Committee: **CONFIDENTIAL**

s/C . Warren Derrick, Jr. M.D.
Chairman

THE UNIVERSITY OF SOUTH CAROLINA

Department of Family and Preventive Medicine
School of Medicine

Six Richland Medical Park Drive
Columbia, SC 29208
803 434-6116

September 9, 1993

J. O'Neal Humphries, M.D.
Dean, School of Medicine
University of South Carolina
Columbia, South Carolina 29203

Dear Dr. Humphries:

I received a letter from Dr. Warren Derrick, Chairman of the Ad Hoc Appeals Committee that recently reviewed Dr. Marie Faltas' appeal concerning her dismissal from the Preventive Medicine Residency Program. I have attached a copy of the letter for your consideration in this matter.

I will await your decision concerning Dr. Faltas' appeal. If any further information is needed, please let me know.

Sincerely,
s/David L. Keisler, M.D., Acting Chairman
Department of Family and Preventive Medicine
USC School of Medicine
Attachment
cc: Clifford Scott, Associate General Counsel
USC System Legal Department

THE UNIVERSITY OF SOUTH CAROLINA

Department of Family and Preventive Medicine
School of Medicine

Six Richland Medical Park Drive
Columbia, SC 29208
803 434-6116

September 20, 1993

J. O'Neal Humphries, M.D.
Dean, School of Medicine
Columbia, South Carolina 29203

Re: Marie Faltas, M.D.

Dear Dr. Humphries:

I have received and reviewed the recommendations of the Appeals Committee concerning Dr. Marie Faltas' dismissal from the Preventive Medicine Residency. It is my recommendation that Dr. Marie Faltas should be reinstated as a Preventive Medicine resident effective at this time.

From discussions with the faculty in Preventive Medicine, it is my understanding that Dr. Faltas must complete a project based on a study at the VA Clinic in order to complete all of her requirements for graduation. It is my recommendation that Dr. Faltas be continued in a paid status as a resident for a six week period of time to allow her to complete this project. Upon successful completion and acceptance of that project, she will then receive her diploma. Dr. David Sheridan will serve as her faculty advisor and assist her in completing this project. In the event that Dr. Faltas does not complete the project in the allotted six weeks, her position as a resident in Preventive Medicine would be discontinued and she could then complete the project on her own time and receive her diploma upon completion. I have attached a copy of a letter from Dr. David Sheridan concerning the specific requirement for completion of this project. If I can be of any further assistance in this matter, please let me know.

Sincerely

s/David L. Keisler, M.D., Acting Chairman,
Department of Family and Preventive Medicine

STATE OF SOUTH CAROLINA
HUMAN AFFAIRS COMMISSION

Dr. Willis C. Ham
Commissioner

2611 Forest Drive, Suite 200, Post Office Box 4490
Columbia, South Carolina 29240

September 29, 1993

Clifford Scott, Esquire
Associate General Counsel
System Legal Department
University of South Carolina
Columbia, SC 29208

Re: Dr. Marie Faltas v. The University of South Carolina
SHAC # 2-93-180REL/Ret/NO

Dear Mr. Scott:

In an attempt to resolve the above-cited charge of discrimination the Commission has met with Dr. Faltas and carefully reviewed the conditions requested by Complainant's attorney in his letter to you dated September 29, 1993. The Commission strongly recommends a resolution in this case because the evidence as presented thus far would warrant a cause determination.

From our meeting with Dr. Faltas, the Commission respectfully requests that the following conditions be met:

1. Reinstatement of Dr. Faltas as a resident in the Preventative Medicine Residency Program ensuring that the same conditions apply to the Complainant as are applied to all similarly situated residents;
2. That appropriate disciplinary action be taken against Drs. Altekruse, McCutcheon and Sheridan to address their alleged discriminatory actions towards the Complainant;
3. That Dr. Faltas' practicum be reviewed in the same fashion as similarly situated residents with the exception that her practicum be reviewed by doctors independent and outside of the Preventative Medicine Residency Program; and
4. Under the current recovery policy of the Commission, Dr. Faltas should be awarded $54,332.^{00}$; $3,500.^{00}$ for legal fees incurred; using a multiple of 5; lost wages ($100,000.^{00}$ year divided by 12 = $8,333.^{00}$ x 4 months = $33,332.^{00}$)

Given the likelihood of a cause determination, the Commission believes that all of Dr. Faltas' demands are reasonable, and amount to far less than court awarded damages. Please respond to the Commission at your earliest convenience.

Sincerely,
s/Ann E. Deal, Investigator

UNIVERSITY OF SOUTH CAROLINA

SCHOOL OF MEDICINE
Department of Family and Preventive Medicine

(803) 765-6116 - Family Medicine
(803) 733-3316 - Preventive Medicine

October 12, 1993

Bobby Gist, Deputy Commissioner
Human Affairs Commission
2611 Forest Drive, Suite 200
Columbia, S.C. 29201

Dear Mr. Gist:

Thank you for the information you provided regarding proper procedures in the case of religious discrimination which Marie Faltas as brought against me and two colleagues on this faculty. The damage to our reputations needs to be held to the minimal, even at this late date.

Attached please find background material you requested. We would be happy to provide further information.

Yours truly,
s/Joan M. Altekruse
Distinguished Professor of Preventive Medicine

THE UNIVERSITY OF SOUTH CAROLINA

Systems Legal Department
Columbia, SC 29208
803-777-7854
FAX 803-777-9500

October 27, 1993

John H. Whittleton, Sr.
State Human Affairs Commission
Post Office Box 4490
Columbia, South Carolina 29240

Re: Dr. Marie Faltas v. University of South Carolina
SHAC Number 2-93-180REL/RET/NO

Dear Mr. Whittleton

This letter is provided in response to the September 29, 1993, letter of Ms. Ann Deal, of the Human Affairs Commission, and constitutes the University's reply thereto.

As you know, the Dean of the School of Medicine, Dr. J. O'Neal Humphries, has recommended Dr. Faltas' reinstatement as a resident in the Preventive Medicine Residency Program. The University will take steps to insure that Dr. Faltas is afforded an opportunity to complete the Residency Program in a manner which is consistent with the Rules, Policies an Procedures governing the Residency Program.

The University acknowledges the other recommendations contained in the above-referenced letter and will act on those recommendations in a manner which it deems appropriate. The University is unable to accept, however, Ms. Deal's recommendation that Dr. Faltas be provided monetary compensation. Thank you for your assistance and cooperation. Please advise if you have any questions.

Sincerely,
s/Clifford Scott
Associate General Counsel

cc: Dr. James C. Moeser, Provost
Walter H. Parham

NEXSEN PRUET JACOBS & POLLARD
ATTORNEYS AND COUNSELORS AT LAW

VICTORIA L. ESLINGER
PARTNER

Direct Dial
803-253-8249
Reply to Columbia

October 28, 1993

Personal and Confidential Attorney/client Privileged

Walter H. Parham, Esquire, Associate General Counsel
University of South Carolina System Legal Department
Columbia, South Carolina 29208

Dear Terry:

I consider this correspondence between us to be attorney/client privileged because Doctors Altekruse, McCutcheon, and Sheridan are faculty members of the University of South Carolina's School of Medicine and have requested this opinion in that capacity although they have born the costs of this themselves.

I have enclosed a copy of opinion to them (which I will be happy to discuss with you) and their proposed correspondence to the Human Affairs Commission. My secretary is out until this afternoon, so these documents do not include the attachments which I will forward as soon as Wanda arrives.

Please call if you have any comments. I would like to discuss the immigration issue with you if you have a chance.

Very Truly yours,

Enclosures s/Victoria L Eslinger

cc: Dr. Sheridan
Dr. Altekruse
Dr. McCutcheon

NEXSEN PRUET JACOBS & POLLARD

VICTORIA L. ESLINGER — Reply to Columbia — Direct Dial

PARTNER — October 28, 1993 — 803-253-8249

Dr. Joanne Altekruse
Dr. Ernest P. McCutcheon
Dr. David P. Sheridan
Department of Preventive Medicine
USC Columbia, South Carolina 29208

CONFIDENTIAL/ATTORNEY CLIENT PRIVILEGED

Re: Dr. Marie Faltas

Dear Drs. Altekruse, McCutcheon and Sheridan:

I have reviewed in its entirety the file and situation regarding Dr. Marie A. Faltas. Included in my review was a review of the 27 court orders and/or opinions issued in miscellaneous lawsuits filed by her which are matters of public record and a review of the individual allegations which she has made about each of you in the press, publicly and to others. As I pointed out during the course of my conversation with you, her EEOC charge of employment discrimination is against the University rather than against each of you individually because Dr. Faltas' charge relates to her dismissal from the USC Residency Program and you as individuals are not her "employers". She has named you as the perpetrators of employment discrimination, essentially acting as agents of the University. Any suit she may be using pursuant to Title VII is by law limited (in a Title VII action) to the charge which she filed with the South Carolina Human Affairs Commission and/or EEOC.

I have prepared a response per your request to be filed with the Human-Affairs Commission (SCHUAC) which sets forth your view of her dismissal and the reasons therefore; the response is attached hereto (without exhibits) for your comments and changes. SCHUAC in all probability because of the breach of confidentiality by Dr. Faltas, will send the matter to the EEOC without a recommendation as to the existence of "cause" or "no cause" for the charge.

I also have prepared an analysis for you as to whether you would be within your rights to insist upon her dismissal in light of Dr. Faltas' refusal to accept the reinstatement offered by the Medical School. By making a counter offer which interposed additional demands, Dr. Faltas declined your offer of reinstatement; her counter proposal operates as a rejection of your offer to settle and now imposes no obligation upon you to settle the matter under the terms previously offered. I would suggest that, if the University (or your Department) decides to reject her recent proposal, you advise her in writing that all previous offers are withdrawn.

In preparing these materials for you I have not addressed any internal problems such as a possible determination by the University that the Medical School should reinstate Dr. Faltas and I have not addressed in detail the issue of what action the Dean of the Medical School may take in light of the Appeal Committee's suggestion that she be reinstated. I do offer as a suggestion that, in light of Dr. Faltas' refusal to accept the reinstatement on the terms offered, you might wish to either go back to the Dean and ask him to rescind the offer and refuse to reemploy her or go back to the Appeals Committee, in light of her rejection of the offer and present evidence which you did not have the opportunity to present during the course of the hearing. Additionally, there are now other matters to be presented to the Committee, such as the omissions in her application, her litigious nature and her immigration status which could have an impact upon its decision regarding reinstatement. You have asked me whether I believe you are within your rights to dismiss Dr. Faltas from the Residency Program and asked specifically that I look at her Title VII charges filed with the Human Affairs Commission in rendering my opinion.1
I undertake herein to give you an opinion on that matter with the caveats that: 1) I cannot guarantee the outcome of a court proceeding and 2) I give no opinion as to what happens if there are any differences in opinion between the School of Medicine and the University of South Carolina within the USC system as to reinstatement.

---

1 Title VII is part of the 1964 Civil Rights Act, as amended and is found at 42 USC 2000(e) et. seq. It prohibits employment discrimination on the basis of sex, race, religion or national origin.

1. Title VII Charge. I do not believe that Dr. Faltas will be able to show a violation of Title VII for religious discrimination or national origin discrimination. Dr. Faltas has filed a charge only against the University of Drs. Altekruse, McCutcheon and Sheridan South Carolina and not against any of the physicians individually. Procedurally, Title VII requires that a charging party file a charge within one hundred and eighty (180) days of the last discriminatory act. Dr. Faltas may amend her EEOC charges provided the acts(s) of which she complains occurred during the prior 180 days (or in some cases 300 days).

The Human Affairs Commission is a deferral agency and the EEOC generally allows it to investigate charges. Jurisdictionally the Human Affairs Commission or the EEOC has sole control of investigation of these charges during a 180 day period after the date of the filing of the charge. Any time after the 180 days from the date of the filing of the charge Dr. Faltas may request a Right To Sue Letter (regardless of whether or not the Commission has made a finding of "for cause" or "no cause").

Once the Right To Sue Letter is issued, Dr. Faltas has 90 days to bring an action in federal court and one hundred and twenty days to bring an action in state court. She is limited in any lawsuit to the charges under Title VII which were raised in her charge. (She can make other allegations pursuant to the common law or other statutes in the same suit). Upon the filing of a Title VII suit, the court would look at the matter de novo, which means that it would not be bound or influenced at all by any finding of "cause" or "no cause" made by the EEOC or Human Affairs Commission.

If Dr. Faltas desired, she could add to her Title VII lawsuit individual lawsuits against anyone else and/or could add additional other non Title VII claims and causes of action for her dismissal.I will address these matters later in this letter because I note that after reviewing all of the lawsuits she has filed that Dr. Faltas' general practice is to take a "shotgun" approach and sue everyone within her sight for every cause of action which she can think of.

In order to prove a Title VII charge, Dr. Faltas must first establish a prima facia case of discrimination on the basis of one of the allegations in her charge; that is, discrimination on the basis or her national origin or her religion. To do that, she must show she belongs to the protected group and that,she was harassed on the basis of her religion or national origin. The burden of proof then shifts to the University to rebut the presumption of discrimination by showing legitimate, nondiscriminatory reasons for the employment decision in question.

In my mind there is ample evidence for her termination for all of the reasons set forth in your various memoranda and internal documents, for reasons including but not limited to her treatment of faculty members and staff, her refusal to follow program rules, policies and procedures, her failure to keep her work on schedule, her inappropriate temperament and failure to adhere to personal or professional standards consistent with the judgment and behavior appropriate to a physician.

Once the University shows that there were legitimate, nondiscriminatory reasons for the employment decision, the burden then shifts to Dr. Faltas to show that the reasons were pretextual and that the employment decision was based on the motive of her national origin or religion. Assuming that Dr. Faltas could make the initial prima facia showing of national origin and religious discrimination, I believe it would be virtually impossible for her to show that the reasons for her discharge were pretextual.

In recent decisions our courts have made the burden which would be faced by Dr. Faltas a very heavy one. Under the current case law even if an employer did not tell the employee the correct reason for his termination, if the employee cannot prove that the actual reason for the termination was because of, in this case, religion and national origin, the employer's decision will not be overturned. It is not a violation of Title VII to discharge people for the reasons you dismissed her, or because they are obnoxious, or because they are litigious or because they do not comply with the internal rules or regulations; Title VII precludes only specific discrimination. I honestly do not think that Marie Faltas could prevail on a Title VII charge; however, even if she were to prevail, she would not have available to her any remedy which required that any of you or others be disciplined or in any way reprimanded. Her relief would be that limited by statute.

2. Additional sustaining grounds for the dismissal decision.

Notwithstanding the actual reasons for her dismissal initially, the current case law is such that if one finds an omission which rises to the level of a misrepresentation, as is the case in Faltas' application for admission to the Residency Program; that alone is grounds for termination notwithstanding any Title VII charges.

Additionally, you may have another ground to uphold dismissal. I am not completely aware of Dr. Faltas' immigration status but the newspapers indicate she is involved in deportation proceedings. If she does not have the appropriate Visa, I believe that the University is precluded from offering her a position. If she is in the process of being deported or undergoing deportation hearings, that indicates to me that her immigration status is so irregular that it would be illegal for the University to hire her.

Dr. Faltas should be well aware of this because she was involved in a lawsuit where her illegal immigration status allowed John Umstead Hospital to divest itself of her. In that situation she did not possess the type of waiver that she still apparently lacks, according to the newspaper articles.

3. Other causes of action or likely action by Dr. Faltas. Even though I am convinced that she could not prevail on her Title VII case, after looking through the myriad of lawsuits that she has filed over the years, I believe she would and will sue a number of individuals for slander, defamation, wrongful discharge, breach of contract, outrage, invasion of privacy and any other cause of action which comes to her mind.

While I believe that you would prevail in any suit, there is the problem that either you or the University may have to go through an actual trial on the other matters or at least proceed through the Summary Judgment Motion (short of trial). She may well file suit even after reaching an agreement with USC as she did with another university. I believe that a Title VII suit would end at the summary judgment level which would avoid a trial, but she may attempt to bring a breach of contract action on the grounds that one of the documents asking her to join the Residency Program could initially have been construed to limit the reasons for which her employment could have been terminated. It is my view that the language in the document is broad enough to allow you to make your decision to terminate her on the basis of your school policies and procedures. I also believe on the basis of her prior lawsuits, that a jury will have a tough time believing Dr. Faltas' allegations that her dismissal was unrelated to her conduct.

As I said earlier, I believe currently there is no outstanding offer to reinstate her because she did not accept your offer, but instead gave you a counter proposal.I would, however, suggest that you talk to the University about whether it wishes in writing to withdraw its offer to her so she cannot abandon her latest demands and accept the prior offer.

It is clear to me that Dr. Faltas will be a difficult individual throughout your association with her.To say she is litigious is an understatement. It does appear to me that she has brought one or more lawsuits against every place at which she was employed or a student and individual suits against any person with whom she disagrees.

I look forward to hearing from you in the near future.

Very truly yours,

s/Victoria L. Eslinger

VLE/wkt

cc: Walter H. Parham

THE UNIVERSITY OF SOUTH CAROLINA

Office of the Dean November 8, 1993
School of Medicine
PERSONAL AND CONFIDENTIAL

Columbia, SC 29208
803 733 3200
FAX 803 733-3335

Marie A. Faltas, MD
500 Gills Creek Parkway, 2002
Columbia, SC 29209

Dear Dr. Faltas:

On September 23, 1993, the School of Medicine offered you the opportunity to be reinstated into the Preventive Medicine Residency Program. In response, on September 29, 1993 through your attorney you rejected the Medical School's offer of reinstatement and proposed a counteroffer in which you demanded several terms and conditions be met before you would accept reinstatement into the program.

This is to advise you that the counteroffer proposed by you through your attorney to the Medical School's offer to reinstate you to the Residency Program is hereby rejected. Inasmuch as you rejected the offer of reinstatement, that offer is hereby revoked. Your status as a resident is terminated effective as of the date of this letter.

Yours sincerely,
s/J. O'Neal Humphries, MD Dean

C: President John M. Palms
Dr. James C. Moeser, Provost
Dr. David L. Keisler, Acting Chair
Department of Family and Preventive Medicine
Preventive Medicine Faculty
Walter H. Parham, General Counsel
Clifford Scott, Associate General Counsel
James Merritt, Esquire,
1200 Main Street, 8th Floor, Columbia, SC 29211-1645

APPOINTMENTS

Bobby Gist, appointed executive assistant lo the president for equal opportunity programs. Gist replaces Cliff Scott, former associate general counsel for the University who has served as interim equal opportunity officer since June. Gist joined the staff of the state Human Affairs Commission in 1972 and served as deputy commissioner since 1978. In his new role at USC, he will be responsible for increasing awareness about equal opportunity efforts, ensuring compliance with the Americans with Disabilities Act and administering the University's sexual harassment policy. Gist received his bachelor's degree from Benedict College and a master's degree in criminal justice from USC in 1977.

PLAINTIFF'S EXHIBIT #3 WAS MARKED FOR IDENTIFICATION.

Q Are you the Ed Turbeville who was copied with those letters?
A Yes.
Q Do you recall having received your copy of those letters?
A Yes.
Q Why would you have received such copies?
A Pardon?
Q Why would you have been copied with those letters?
A Because we hired the Nexsen, Pruet firm to defend this lawsuit -- or these lawsuits, I guess you would say, both.
Q When you say both, what do you mean?
A Well, there are two individual suits, two numbers.
Q You may look at the letters again. Do they refer to two individual suits?
A Well, not this one. This is the first claim we received, and the distinction being because I.N.S. was involved in it.
Q So in January, when you were copied with these two letters, Plaintiff's Deposition Exhibits 2 and 3, how many lawsuits were pending by me against any of your insureds?
A At that time it was just this action here, I think. The other action was later filed.
Q All right.
A Okay.
Q Who made the decision to hire Nexsen, Pruet for this action?
A I did.
Q As we sit here, do you have knowledge as to how you based that?
A To how I based it?
Q Yes.
A Well, we had -- we have an unusual scheme. The Attorney General has--- Do I need to go into that?
MR. BREWER: Go ahead.
MR. BRIGGS: Just so he knows, we're aware of the list.
A Okay.
MR. BRIGGS: We've seen the list.
A Okay.
MR. BREWER: What she's asking you is how did you come to hire Nexsen, Pruet in that case. Just answer that question.
A Okay. Well, I knew that -- I communicated with Mr. Parham, the University's legal counsel. Matter of fact, he sent the claim to me. I communicated with him, and I knew through my conversation with him that this firm was already involved to some degree in this litigation. Well, not in litigation but with Dr. Altekruse, one of the parties one of the defendants. My contention as a claims manager is why reinvent the wheel. This is a firm we use quite a bit. We use them on a rotational basis, but we do use them.

And from a cost standpoint, if we have an attorney who is already involved in litigation and there's no conflict, then from the standpoint of even as a taxpayer myself, why hire another separate firm who has to go in and learn all the new facts? So that was the basis for that, if it makes any sense.

Q It does make sense. However, you need to tell me what was Ms. Eslinger's involvement prior to January of '94.

A What was her involvement?

Q Yes.

A Well. I do know that she had been involved. The extent, I don't know. I didn't get into that with Mr. Parham. I do know that she had done some other things for them. What, I don't know. But then she had been involved apparently with some representation of Dr. Altekruse. I don't know. I didn't get into the extent of that. But she had familiarity with the facts in the case.

Q So she was involved with Dr. Altekruse and with the University before the I.N.S. case was filed.

A That was my understanding. I'm not – I am not certain.

Q Did you at the time question what involvement she would have had if there was no lawsuit?

A No. I normally — If I may interject, I normally use one of Mr. Brewer's partners, Susie McWilliams. She does a lot of work for the Insurance Reserve Fund, and that was my normal routing channel. Even when I assigned the case, as I recall, I assigned it to Susie.

Q I'm sorry. This may not be what you're trying to tell me, but I understand that to mean that whenever you get a case you assign it to Susie McWilliams. Is that what you're telling me?

A She's a member of that firm. We have a contact in law firms. Sometimes Mr. Brewer is not available. Susie is my next contact.

Q So Susie is your first contact in the Nexsen, Pruet law firm?

A Yes.

Q And then the Nexsen, Pruet law firm is the firm you would give -- to which you would give every case that gets assigned to you?

A Wait a minute, now. Repeat it again. I'm sorry.

Q It may not be what you meant to say, but this is the understanding that I'm getting, and, of course, you're free to correct it. The Nexsen, Pruet law firm is the law firm to which you assign every case you get?

A No. No, no, no. Not every case I get no.

Q Most cases you get?

A No.

Q What percentage of the cases you get you assign to them?

A Of the cases I personally work, I think this is the only suit they're involved in for me.

Supreme Court, U.S.
FILED
AUG 12 1999
OFFICE OF THE CLERK

No. 98-2001

IN THE

Supreme Court of the United States

MARIE-THÉRESE ASSA'AD-FALTAS, MD, MPH,

Petitioner,

v.

THE UNIVERSITY OF SOUTH CAROLINA, *et al.*,

Respondents,

-and-

MARIE-THÉRESE ASSA'AD-FALTAS, MD, MPH,

Petitioner,

v.

THE ATTORNEY GENERAL OF VIRGINIA
FOR THE COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS THE UNIVERSITY OF SOUTH CAROLINA, *et al.*

SUSAN P. MCWILLIAMS*
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QUESTION PRESENTED

Did the Fourth Circuit Court of Appeals correctly conclude that the petitioner's utter failure and refusal to comply with court orders and her flagrant abuse of the discovery process fully warranted the sanction of dismissal in *Assa'ad-Faltas v. University of South Carolina*, No. 96-2159 and *Assa'ad-Faltas v. Attorney General of Virginia*, No. 96-2177?

PARTIES TO THE PROCEEDING

The petitioner's list of parties is correct with the exception of the spelling of J. O'Neal Humphries and Lawrence Dark.

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Appendix A1

OPINIONS BELOW

The Fourth Circuit's unpublished decision in *Assa'ad-Faltas v. University of South Carolina* (hereinafter "the USC case") is set forth in the Appendix filed by the petitioner at A1-A3. The Fourth Circuit's unpublished decision in *Assa'ad-Faltas v. Attorney General* (hereinafter "the Attorney General case") is set forth in the petitioner's Appendix at A3-A5. Because the petitioner included in her Appendix only selected portions of Judge Joseph F. Anderson, Jr.'s July 11, 1996 Order on Plaintiff's Motion for Reconsideration in the USC case and his August 16, 1996 Substituted Order Denying Plaintiff's Motion to Alter or Amend in the Attorney General case, said orders are set forth in their entirety in the respondents' Appendix.

STATEMENT OF JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States clearly states, in relevant part, "A petition for a writ of certiorari will only be granted for compelling reasons." The respondents submit that this case, which involves merely a discovery dispute, is not within the character of the reasons the Court would consider a petition. As there are no compelling reasons to grant the petition, it should be denied.

FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

There are no federal statutes or constitutional provisions involved.

STATEMENT OF THE CASE

Far from involving important questions of law and novel constitutional issues as the petitioner claims, this case merely involves discovery disputes in which the petitioner's conduct was so deplorable that it warranted the sanctions of dismissal. Although the petitioner has argued the merits of her underlying cases in her unified petition for a writ of certiorari, as she did in her briefs to the Fourth Circuit Court of Appeals, the merits of her cases are wholly irrelevant as the merits were never reached by the district court or the Fourth Circuit Court of Appeals. As stated in United States District Judge Joseph F. Anderson, Jr.'s March 18, 1996 Order Dismissing Action with Prejudice in the USC case:

> Neither does this court suggest any belief as to whether plaintiff's allegations are or are not meritorious. Unfortunately, plaintiff's behavior has precluded this court from reaching the merits of her remaining claims. This is unfortunate, but it is plaintiff's own doing. If plaintiff wishes to avail herself of this court's authority to resolve disputes, she must abide by the rules of this court. She should not be allowed to complain that the merits of her case were never reached when she has engaged in every opportunity to avoid discovery and waste the court's time on unnecessary disputes or pointless collateral matters.

(March 18, 1996 Order at page 22) Furthermore, as noted by Judge Anderson in the Attorney General case, "[I]n deciding whether to dismiss a case for discovery abuse, the court

presumes that the underlying case is meritorious." (July 19, 1996 Order re Motions for Dismissal at page 41) Accordingly, the petitioner's "Questions Presented" in her petition are not properly before this Court, with the possible exception of question number nine relating to the imposition of FED. R. CIV. P. Rule 11 sanctions, which were assessed against her in the Attorney General case. The respondents would further note that, despite the petitioner's statement that the facts in this case are "uncontested," the petitioner's brief is replete with misrepresentations and unadorned falsehoods. Although it would be impossible and pointless to respond to each misrepresentation within the constraints of this brief, the respondents particularly take exception to the petitioner's false characterization of the actions involving Joan Altekruse and Victoria Eslinger, as well as her misrepresentations regarding the discovery she alleges to have provided in these matters.

Both the USC and Attorney General cases arise out of an employment relationship between the petitioner and the University of South Carolina's School of Medicine. The relationship ended in November, 1993 when the petitioner was terminated. The respondents in the Attorney General case, which was filed subsequent to the USC case, include those who were not properly served in the USC case, the lawyers who represented the defendants in the USC case, the husband of one of the lawyers, as well as two employees of the South Carolina Insurance Reserve Fund, which provides insurance to the University of South Carolina and other governmental entities. Both lawsuits were dismissed with prejudice as a result of the petitioner's misconduct and abuse of the Federal Rules of Civil Procedure. An overview of the events that followed the filing of the complaint alleging twelve causes of action against thirty-four defendants in the USC case is set out in Magistrate Judge Joseph R. McCrorey's July 19, 1995 Order and

Recommendation and in Judge Joseph F. Anderson, Jr.'s March 18, 1996 Order Dismissing Action with Prejudice. Judge Anderson's July 19, 1996 Order Re Motions to Dismiss explains the circumstances surrounding the dismissal of the Attorney General case. Several instances of the petitioner's innumerable acts of misconduct in each case are set forth below by way of example to this Court.

A. The USC case

1. Interrogatories and Document Production

The petitioner unilaterally thwarted the discovery process from the outset in this case. The respondents served their first interrogatories and requests for production on October 4, 1994. In what would become a pattern of evasive conduct, the petitioner provided no response, thereby necessitating the respondents' first motion to compel. The petitioner then responded to the respondents' interrogatories in a document which was replete with evasive, inadequate answers and frivolous objections. For example,[1] the respondents' fifth interrogatory to the petitioner requested the names, qualifications, etc. of any expert witnesses. The petitioner's eventual response provided, "Plaintiffs object to this interrogatory on the same grounds as to Interrogatories 1-3,

---

[1]It is literally impossible to provide the Court an accurate picture of the petitioner's utter failure to provide any meaningful discovery by way of this brief. Although a few examples are set forth to provide the Court some flavor of her misconduct, a complete review of the voluminous record of this case is necessary to comprehend the extent of the petitioner's discovery abuses.

above; they do, however, answer it in the same manner they answered Interrogatories 1-3, above." The petitioner's joint response to interrogatories 1-3, which generally asked for names of witnesses, a summary of the facts known to such witnesses, and a list of documents which related to the case, consisted of several objections and the statement that "[p]laintiffs do state however, that every person and every document and/or object mentioned in their Complaint is a potential witness or exhibit."

Such responses prompted the respondents' second motion to compel. The court ordered the petitioner to respond more fully to said interrogatories and granted her an extension of time to respond to the interrogatories until June 9, 1995. The petitioner's failure to provide complete and adequate discovery responses a full eight months after the respondents' initial discovery was served resulted in their third motion to compel responses to interrogatories and for sanctions. This motion for sanctions was eventually granted, and the petitioner's action was dismissed as a result of her non-responsive and inadequate answers to interrogatories, together with her misconduct during document production, her deposition, and her general abuse of the discovery process.

As was the case with the respondents' interrogatories, the petitioner initially failed to respond at all to document production requests, causing the respondents to file a motion to compel. Thereafter, the petitioner sought a protective order in which she objected to having to "truck her massive production" to defense counsel's offices and otherwise typically included lengthy, irrelevant, and false material in her motion. The court denied the petitioner's motion for a protective order and the respondents' motion for sanctions, but granted the respondents' motion to compel and ordered the petitioner to produce the

responsive documents within twenty days. In keeping with her dilatory practices, the petitioner sought an extension of time to produce the documents on the twentieth day. The respondents again were constrained to file a motion to compel as a result of the petitioner's violation of the court's order requiring her to produce the documents within twenty days, particularly in light of the petitioner's deposition being scheduled to begin on May 25, 1995, two days after the deadline for the document production.

At the hearing scheduled to address this and other issues, the petitioner reiterated her alleged fear of going to offices of the respondents' counsel and described the responsive documents as so massive that a truck would be needed to transport them. A compromise was reached wherein the respondents' counsel and the petitioner would meet at a copy shop where the responsive documents would be inspected and copied. As a courtesy to the petitioner, a courier from the respondents' counsel's law firm was authorized by the court to assist the petitioner with loading and unloading the documents. Further, the petitioner was to produce a privilege log and submit it, along with a copy and the original of the documents, to the court on June 2, 1995. When the courier arrived at the petitioner's residence to help her load the documents, she refused to produce the documents, in violation of the court's May 30, 1995 Order. Thus, the respondents were again required to file yet another motion to compel and for sanctions.

Thereafter, at a hearing held on June 2, 1995 to address the issue of privileged documents and the respondents' motion to compel and for sanctions, the petitioner again asserted that she possessed a massive amount of documents and had not had time to assemble them when the courier arrived to assist her in loading them for document production. Notably, when the

petitioner finally delivered the documents to the office of the respondents' counsel on June 5, 1995, the documents consisted of only 713 pages. Obviously, the petitioner's representations that her documents were massive and required the use of a courier and a truck to transport them were false.

Further, in violation of the court's May 30, 1995 Order, the petitioner produced an inadequate privilege log and failed to produce the original and copy of the documents described therein. At this hearing, the petitioner represented that she possessed privileged documents pertaining to the case, including records and notes of telephone and other conversations with numerous individuals listed in her privilege log.

Subsequently, the court imposed FED. R. CIV. P. 37 monetary sanctions on the petitioner for failure to comply with the court's orders and warned her that further failure to obey court orders would result in further sanctions, "up to and including the dismissal of this action." The court imposed yet another deadline, this time June 5, 1995, for the petitioner to produce the documents which were initially requested by the respondents October 4, 1994. The court further provided the petitioner detailed instructions as to the requirements of a privilege log and ordered her to provide a sufficient log together with the original and a copy of the privileged documents to the court by June 6, 1995 for *in camera* inspection.

The petitioner appeared in court on June 6, 1995 with no document log and no documents, once again in violation of the court's orders. Moreover, she asserted that she had **no** responsive documents, despite her earlier specific indication on her privilege log, which the court determined to be insufficient, that she had in her possession records and notes of telephone

and other conversations with over thirty-nine individuals. The court again ordered the petitioner to produce an adequate privilege log along with the corresponding documents, this time setting the deadline of June 12, 1995. The petitioner failed to appear at the hearing on June 12, 1995 in violation of the court's June 7, 1995 Order. Although she later testified that her absence was caused by illness, the petitioner had been present at the office of the respondents' counsel on that same morning to reproduce audio tapes.

Yet again, the court indulged the petitioner and provided her another opportunity to produce the privilege log and the statements of the individuals she had listed in her original privilege log. As noted in the Magistrate Judge's Order and Recommendation, this order warned the petitioner that "[i]f [she] fail[ed] to appear or to produce the above described documents and privileged document log, **the undersigned will recommend that the within action be dismissed**." The petitioner appeared and produced documents for *in camera* inspection. According to the Magistrate Judge's Report and Recommendation, he was "utterly astounded by plaintiff's submission." According to the Magistrate, the documents provided by the petitioner consisted of "irrelevant notes written on the back of envelopes and scraps of paper." Significantly, the group of documents did not include any records and notes of telephone and other conversations with the individuals listed in the petitioner's initial privilege log.

2. Deposition of Petitioner

The respondents initially noticed the petitioner's deposition for December 21, 1994 at 9:30 a.m. in the offices of their counsel. The deposition was to be recorded both stenographically and by videotape. The petitioner's first attempt

to undermine her deposition occurred on December 9, 1994 when she faxed a letter to the Magistrate Judge "seeking to change the location of the deposition, objecting to the court reporter and seeking permission to tape record her deposition to insure that no changes were made." (Magistrate Judge's Order and Recommendation at page 17) Her objection to the location of the deposition was based on an unfounded paranoia that she would be in some sort of physical danger at the respondents' counsel's office. She also expressed the baseless fears that the court reporter would deliberately misrecord her testimony and that the respondents' counsel would alter or steal her documents. On December 12, 1994, the Magistrate Judge ordered that the deposition go forward as noticed. Thereafter, the petitioner requested that the deposition be postponed as she anticipated that she was becoming ill. As an accommodation to the petitioner, the respondents' counsel offered in writing to reschedule the deposition for January 5-6, 1995. The petitioner agreed in writing to the commencement of her deposition on January 5, 1995.

The petitioner failed to appear for her deposition on January 5, 1995, in violation of the court's December 12, 1994 Order. Thereafter, the petitioner moved to forbid the respondents from moving to compel her deposition because the correspondence rescheduling her deposition pursuant to her request did not re-state the beginning time, location, and the identity of the court reporter. In her motion, the petitioner also attempted to justify her failure to appear for the deposition by stating that she "began to worry that her 'rescheduled' deposition was just a ploy for [respondents' counsel] to contrive an incident where she would be evicted 'by security' from the offices of NPJP." She stated that

> [h]er worry was confirmed by the absence of any written notice: without a notice in hand, at whatever time she would have gone to the offices of NPJP and said "I am here for my deposition", she would have been told to wait for long enough enough [sic] for [respondents' counsel] to "call security" and say to them them [sic]: "There is an Egyptian woman trespassing on our offices. COME AND EJECT HER IMMEDIATELY!!"

She further noted that "'security' could have been instructed to use 'all necessary violence' to eject her." The petitioner's frivolous motion was denied, and the respondents' motion to compel her deposition was granted. Although the respondents' motion for sanctions was denied, the order clearly admonished the petitioner that the court would impose "significant sanctions" if the petitioner failed to appear again or obstructed her deposition.

The petitioner's deposition was next noticed for May 25, 1995. Two days before the deposition was scheduled to begin, the petitioner filed a motion objecting to the location of the deposition and the court reporter, despite the court's May 3, 1995 ruling that the office of the respondents' counsel was an appropriate location and that any court reporter qualified under the Federal and Local Rules could take the deposition. After a hearing which resulted in the imposition of an explicit discovery schedule, the petitioner's deposition was scheduled for the week of June 19, 1995, to be held in the Magistrate Judge's courtroom in the federal courthouse.

The petitioner's deposition consisted of five days of extremely abusive and intolerable conduct directed at the

respondents' counsel. She provided obviously evasive responses to straightforward questions; objected almost constantly to unobjectionable questions; refused to identify documents, claiming that the respondents' counsel may have altered them; consistently arrived late; had frequent emotional outbursts; and repeatedly insulted the respondents' counsel. Screaming "Shut up you bitch!" at one of the respondents' lawyers is but one example of her pattern of outrageous conduct. The extent of the petitioner's abuse during her deposition is indescribable and can only be gleaned by a review of the videotape of the deposition.

3. Contumacious Conduct

The petitioner's appalling conduct permeated every aspect of this litigation. Her behavior in the courthouse caused security concerns on the part of the Office of the United States Marshal and the court, prompting the court to authorize the United States Marshal, and his representatives, to escort the petitioner while she was in the courthouse. The security concerns arose from an episode which occurred in one of the petitioner's previous cases in which she approached Ms. Eslinger, one of the respondents' counsel in the previous case as well as in this action, "in what may reasonably be viewed as a threatening manner, raising her voice and raising both of her arms in front of her body with her fingers drawn up in a fist-like gesture." (November 7, 1995 Order) The courtroom security officer "felt compelled to walk near the participants in an effort to calm the situation." Id. Additionally, the court noted that it had had the opportunity to observe "numerous instances when [the petitioner] has acted in a manner inappropriate for the courthouse and courtroom raising her voice, frequently interrupting the court and opposing counsel, and even insulting opposing counsel in the courtroom." Id.

The petitioner's harassment of the respondents' counsel extended to at least one counsel's family. She contacted Ms. Eslinger's home and asked personal questions of the person who answered the phone, including questions concerning Ms. Eslinger's young child. This intolerable and frightening misconduct led to the issuance of a permanent restraining order on July 5, 1995 which enjoined the petitioner from contacting the home of any lawyer or party to this litigation.

Further, the petitioner generated an onslaught of letters, motions, and memoranda which were filled with abusive comments directed toward the respondents, their counsel, and members of the court. For example, although she insisted on being addressed as "Doctor," she wrote to Ms. Eslinger and Ms. McWilliams and addressed them simply as "Women." Alternatively, she referred to defense counsel by sarcastic titles such as "Empress Eslinger," "Baron Brewer," "old fart," or simply by their last names. On one occasion, the court requested that she address defense counsel as "Mr." or "Mrs." in court, rather than simply using their last names. She refused.

The petitioner's accusations against the respondents, their counsel, and members of the court are both scandalous and countless, not to mention false and wholly speculative. She accused the respondents' counsel of, *inter alia*, racism, advising USC to commit various torts against her so that she would sue USC and USC's general counsel would recommend that they be hired to defend the case, encouraging attorneys in other actions pending in other districts to file frivolous motions to distract her from the various actions pending in this district, lying to the court and encouraging others to do so, etc. She accused Joan Altekruse, one of the respondents in this action, of stealing a baby and pretending it was her own and consistently referred to her in court documents as a lesbian.

The petitioner's vicious attacks extended to members of the court. For example, in an apparent effort to gain the recusal of Judge Anderson,[2] she submitted a letter *in camera* to Judge Anderson in which she accused him of writing "awful" opinions, torturing her, being unfair, possibly having her telephone put under surveillance, holding one of her cases in abeyance to make her "behave" in other cases, and other unethical conduct. She further made mention of "a rumor about [Judge Anderson's] personal life." The petitioner designated that the letter was "[t]o be distributed, if at all, as the Court desires." (September 20, 1996 letter attached to September 25, 1996 Order on Plaintiff's September 20, 1996 *In Camera* Submission)

Her personal attacks against the respondents and their lawyers resulted in a June 11, 1996 Order by Judge Anderson which noted that the court had repeatedly cautioned the petitioner about making unsubstantiated and irrelevant personal attacks. Judge Shedd also noted that "[m]any of Faltas's legal materials contain abusive statements and allegations about

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[2]The petitioner moved repeatedly for the recusal of Judge Anderson, claiming he was prejudiced against her. She also sought the recusal of the Magistrate Judge, a Special Master who was court-appointed to oversee her deposition in the Attorney General case, and United States District Judge Dennis W. Shedd on the same grounds. In addressing "Plaintiff's Third Motion to Recuse," Judge Anderson noted: "As demonstrated by plaintiff's questioning of the special master in a hearing held on June 25, 1996, plaintiff bases her motions for recusal at least in part on her view that the judicial officers must dislike her because of her own instances of offensive behavior."

members of this Court, opposing parties, and opposing counsel" and that the petitioner "is a full-time litigant who uses federal litigation as a means of harassing the (apparently) many persons with whom she has had what she perceives to be negative contact during her stay in this country." (March 19, 1997 Order) As a result of the above-described abuse and the innumerable undescribed acts of misconduct, the court dismissed this lawsuit with prejudice.

B. The Attorney General case

1. Interrogatories and Document Production

The discovery process in this case was essentially a repeat of the abuses the petitioner inflicted in the USC case. The respondents served their first interrogatories between December 7 and December 13, 1995. Despite receiving an extension of time, the petitioner failed to serve any responses to these discovery requests and the respondents moved to compel. Thereafter, the court granted the respondents' motion to compel and ordered the petitioner "to respond fully to each of these defendants[']requests, as worded and numbered by defendants . . ." and sanctioned the petitioner in the amount of $300.00 for discovery abuses. (January 30, 1996 Order on Rule 11 Sanction . . . and Discovery Abuses at page 25) Further, the court provided detailed instructions with regard to discovery. (December 19, 1995 Order on Discovery Procedures; October 11, 1995 Order at 19-20; and January 30, 1996 Order on Rule 11 Sanctions . . . and Discovery Issues)

However, instead of complying with the court's orders, on February 14, 1996, the petitioner served two documents entitled "Plaintiff's Responses to all Defendants' Except Humphries' Interrogatories Part I" and "Plaintiff's Responses to all

Defendants' Except Humphries' Interrogatories Part II." These two documents were in flagrant disregard of the court's prior orders and, while styled as responses to interrogatories, were actually convoluted and nonresponsive replies. Procedurally, the petitioner's responses were a nightmare. For example, Part I began with two pages of objections to the respondents' prefaces and definitions and instructions. The respondents provided specific definitions and instructions in order to ensure that the petitioner was fully and thoroughly informed of the specific information which they were seeking in an attempt to avoid a discovery disaster as had occurred in the USC case. However, the petitioner responded by objecting to the respondents' definitions and instructions and supplying her own definitions for the terms in the interrogatories. For example, she wholly refused to identify documents, refused to identify any corroborating witnesses, and refused to supplement her responses as may become necessary. This was yet another in the petitioner's exhaustive list of attempts to dictate the information which she was willing to provide in discovery.

Moreover, instead of answering each respondent's interrogatories, the petitioner took the liberty of arbitrarily grouping together various respondents' interrogatories and providing one purported response to the same. The petitioner's failure to abide by the court's orders and the Federal Rules of Civil Procedure made her responses virtually impossible to follow and completely useless.

Substantively, the petitioner's responses were often indecipherable and meaningless and essentially provided none of the requested information. For example, she provided a joint response to "Altekruse's, Barresi's, Dark's, Sheridan's, and Weeks' 1 and 2; and Chastain's 2-5, respectively." Her response stated that the witnesses included "all persons with

whom she had RELEVANT contact concerning any defendant(s) and/or who were present during RELEVANT contact she had with any defendant(s)." Not only did the petitioner fail to "identify" said witnesses despite the respondents' clear definition of the word "identify," she failed to even provide a single witness's name. Further, she responded that "[t]he matters known to these witnesses are the substance of the contacts." Further, she responded that "[w]hether any statement was taken from them or not is privileged work product." The petitioner knew that whether any statement was taken from such a witness is a standard and proper interrogatory question and is not privileged, as such information was provided to her in Judge McCrorey's May 3, 1995 Order in the USC case at page 2.

Further, the petitioner frequently responded to various interrogatories simply by stating that the documents would be produced, apparently attempting to rely on FED. R. CIV. P. 33(d). This was in blatant disregard of the court's admonition in its December 19, 1995 Order that "[a]ny party seeking to respond by referring to Rule 33(d) is, however, required to strictly comply with the requirement that the document be specified 'in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.'" In fact, the petitioner did not describe the documents in any detail and, in most cases, simply stated that the documents would be produced.

In several responses, the petitioner demanded that the respondents pay her an expert fee before she would answer the interrogatories. In other responses, she provided rude, irrelevant, gratuitous comments. For example, her response to Alteku use's twentieth and twenty-third interrogatories begins:

"Only an idiot would deny that when someone has an employment contract with an entity . . . ." The last sentence of her response to Barresi's tenth interrogatory states: "Only an idiot expects the State of South Carolina to hire people to put lies on state government letter head." These examples of the petitioner's purported responses are not only blatantly improper, but they flaunt the court's January 30, 1996 Order which "assure[d] the parties that unnecessary sarcasm, aspersions or negative personal comments are counter-productive . . . ." (January 30, 1996 Order at pages 9-10) Significantly, these responses were filed[3] during the time in which the court was considering whether to adopt the Magistrate Judge McCrorey's Report and Recommendation in the USC case, which recommended dismissal of the petitioner's case for discovery abuse.

Although it is impossible to address every inadequacy in the petitioner's responses, the flagrancy and intentional deficiencies of the responses are apparent upon a reading of the same. These responses prompted Judge Anderson's February 21, 1996 *Sua Sponte* Order Compelling Discovery which noted:

> Unfortunately, even a cursory review of plaintiff's responses to the present interrogatories reveals that she has taken no heed either of this court's repeated instructions as to discovery generally or the severe sanction recommended in the prior action for discovery abuse. Plaintiff's answers are often entirely evasive or nonresponsive. After reviewing

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[3]These responses were provided to the district court as required by prior orders on discovery procedures.

> these responses, the court is left with the unmistakable impression that plaintiff intends to avoid providing any meaningful discovery in response to these interrogatories.

(February 21, 1996 Order at page 2) The court yet again warned her that "the court has available sanctions including striking specific allegations, individual claims, or the entire complaint, if it finds that plaintiff is evading reasonable discovery." (February 21, 1996 Order at page 13) Further, the court sanctioned the petitioner in the amount of $500.00, as her responses were "facially inadequate" and the court had "previously instructed [her] to fully respond to these interrogatories after finding [her] earlier objections to be frivolous and an inappropriate attempt to delay discovery." (February 21, 1996 Order at page 14)

The court directed the petitioner to amend her discovery responses in accordance with the order by March 8, 1996 and noted that the respondents were entitled to the production of documents referenced in the responses as soon as a reasonable time could be arranged. The petitioner never complied with the court's requirement that she properly supplement her interrogatory responses. Accordingly, the respondents were compelled to proceed with her deposition without the benefit of appropriate interrogatory responses, although the court did impose certain sanctions in the form of limiting the petitioner's reliance on matters and witnesses not previously fully disclosed. (May 15, 1996 Order)

On March 19, 1996, the court ordered the petitioner to complete production[4] of those documents which she had elected to produce in response to interrogatories as allowed by FED. R. CIV. P. 33(d) and expressly reminded the petitioner that she must produce the documents "marked as indicated in her interrogatory responses." The court's February 21, 1996 *Sua Sponte* Order Compelling Discovery expressly required immediate production of any documents relied on in response to interrogatories, and the petitioner had failed to comply as of March 19, 1996. Although the court had previously ordered her to "produce *all* responsive documents, marked as indicated in her interrogatory responses, on March 21, 1996 . . . ," (March 19, 1996 Order Granting Defendants' Motion to Compel Production at page 3), she continued her pattern of defiance of the court's discovery orders. The documents she produced were not marked in any fashion. The petitioner merely placed "cover-sheets" on top of stacks of documents, which indicated to which interrogatories said documents purported to respond. However, although the respondents' counsel spent several hours attempting to review said documents in an effort to determine what evidence she claimed supported her various allegations, said attempt proved to be futile.

The futility of said task was due to several factors. First, the documents themselves bore no markings, which was in direct defiance of the court's December 19, 1995 Order on Discovery Procedures (at page 4) as well as the March 19, 1996 Order Granting Defendants' Motion to Compel Production (at page 3). The respondents were therefore forced to label the documents in order to reference them in a motion for sanctions.

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[4]The petitioner had previously produced only a selective group of documents.

Second, the documents were not arranged sequentially following the natural sequence of those interrogatories she chose to answer by reliance on FED. R. CIV. P. 33(d). Third, the documents were not even separated out as to respondent. For example, one of her "cover sheets" purported that the documents to follow were responsive to interrogatories propounded by five different respondents. Further, there were two "cover sheets" which purported that the "entire production is conceivably responsive" (emphasis added) in some way to the interrogatories listed on the "cover sheets."

Another point of confusion was the placement of the paper-clips on several documents. At the document production, counsel for the respondents asked the petitioner if all of the documents following one "cover-sheet" were responsive to the interrogatories identified on said "cover-sheet" until another "cover-sheet" appeared in the stack of documents. She stated that this was incorrect and offered to "paper-clip" the documents to the "cover-sheet" to which they were responsive. She did "paper-clip" some documents, but there were numerous "loose" documents remaining. It was impossible for the respondents' counsel to decipher to which interrogatories the petitioner alleged that these "loose" documents were responsive. In essence, the respondents were unable to extract any meaningful information whatsoever due to the illogical and unorganized fashion in which these documents were produced.

At the hearing on the respondents' motion for sanctions for, *inter alia*, the petitioner's failure to specify which documents were responsive to which interrogatories, the petitioner indicated that she would correct this problem by providing a log. The court ordered her to provide such a log within ten calendar days or by May 2, 1996. (April 22, 1996 Order) She again flaunted the court's order. The log she

eventually produced on May 10, 1996, the Friday before her deposition was to begin, did not comply with the court's orders and was basically indecipherable. She attempted to justify the form of the log in a teleconference held on that issue by arguing that the respondents could get the information they needed from her in her deposition. As noted in the July 19, 1996 Order Re Motions for Dismissal, the petitioner's "delay and failure to produce the log in a more readable manner prior to her deposition clearly prejudiced defendants in their ability to prepare for plaintiff's deposition as well as in the significant added expense of covering the same matter in plaintiff's deposition." (July 19, 1996 Order at page 11)

2. Deposition of Petitioner

Prior to the petitioner's deposition, the respondents' counsel requested that the deposition be taken in the courthouse and that a judicial officer be appointed to preside over it. This request was based on prior experience with the petitioner, particularly throughout her deposition in the USC case. The petitioner sought to choose the court reporter, to impose a time limit on the deposition, and to preclude videotaping of the deposition. As noted in the July 19, 1996 Order Re Motions for Dismissal, the court resolved the dispute by: (1) allowing the choice of two neutral locations other than the courthouse; (2) requiring the respondents to accommodate the petitioner's request for handicapped parking; (3) setting a daily time limit on actual questioning; (4) allowing the respondents to videotape the deposition; and (5) making itself available by phone to resolve disputes as they arose.

The deposition began with the petitioner refusing to face the video camera, thus necessitating the court's involvement at the onset. The remainder of the deposition consisted of her

subjecting the respondents' counsel, and eventually the special master, to extremely abusive and intolerable conduct. She provided obviously evasive responses to straightforward questions; objected almost constantly to unobjectionable questions; refused to identify documents, claiming that the respondents' counsel may have altered them; consistently arrived late; had frequent emotional outbursts; and repeatedly insulted the respondents' counsel. By the end of the second day, the respondents had moved to have a judicial officer appointed to preside over the deposition, and the petitioner had moved to terminate the deposition. After viewing a videotape from the deposition, the court appointed a practicing attorney to preside over the deposition as special master. However, the presence of the special master failed to curtail the petitioner's abuse. As noted in the July 19, 1996 Order Re Motions for Dismissal,

> A review of the videotapes reveals that despite the special master's presence, [the petitioner] continued her pattern of evasion and utterly inappropriate outbursts. The outbursts led to several instances in which plaintiff pulled off her lapel microphone and slammed it on the table. This pattern of behavior led the videographer to ask to tape the microphone to the table to avoid destruction of the microphone.

(July 19, 1996 Order at page 16) At one point in the deposition, the petitioner's misconduct was so extreme that the special master deemed it to be "physically threatening." (Report of the Special Master at page 4) The extent of the petitioner's abuse during her deposition is indescribable and can only be gleaned by a review of the videotape of the deposition. However, a

review of the May 22, 1996 Report of the Special Master summarizes her extremely contumacious conduct.

The petitioner unilaterally ended her deposition on May 21, 1996 by failing to return after a break in direct defiance of the special master's instructions. The special master had specifically stated on the record that the deposition would reconvene after the break, yet the petitioner failed to return. Thereafter, the respondents' counsel notified the petitioner that the deposition would then reconvene at 9:00 the next morning, but she once again failed to appear. The petitioner filed a motion which appeared to argue that she was sick and unable to continue her deposition. As noted in the July 19, 1996 Order at page 17, "[t]he only illness specifically referenced in the written motion is [her] long standing partial vocal cord paralysis. Nonetheless, [the petitioner] was willing to continue the deposition by phone from her home." Subsequently, the petitioner argued that she had informed the special master that she was ill and unable to continue, but the videotape and back up audiotapes failed to support this contention. Moreover, the petitioner's conduct at the June 25, 1996 hearing, which was scheduled to consider her various failures to timely return to her deposition after breaks, was most telling. Astonishingly, she failed to timely return from a break in the hearing, and the hearing had to be completed in her absence.

Thereafter, the petitioner's action was dismissed with prejudice as a result of her wilful and egregious pattern of evading discovery; her outrageous misconduct throughout the discovery process and, specifically, during her deposition; her

failure and refusal to comply with court orders; and her general abuse of the judicial system.[5]

ARGUMENT

The Fourth Circuit Court of Appeals correctly concluded that the petitioner's utter failure and refusal to comply with court orders and her flagrant abuse of the discovery process fully warranted the sanction of dismissal in the USC and Attorney General cases.

The Fourth Circuit has adopted a four factor test to determine when dismissal is an appropriate sanction. The four factors to be considered by the court are: (a) whether the noncomplying party acted in bad faith; (b) the amount of prejudice noncompliance caused the adversary, which necessarily includes an inquiry into the materiality of the evidence not produced; (c) the need for deterrence of the particular sort of noncompliance; and (d) the effectiveness of less drastic sanctions. Mutual Fed. Sav. & Loan Ass'n v. Richards & Associates, 872 F.2d 88, 92 (4th Cir. 1989).

A. Bad Faith

As stated in Judge McCrorey's July 19, 1995 Order and Recommendation, "the conclusion that [the petitioner] has acted in bad faith is inescapable." The petitioner is an atypical *pro se* litigant in that she is very experienced in the

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[5]Judge Anderson's July 19, 1996 Order Re Motions for Dismissal provides a detailed analysis of what the court considered in deciding to dismiss the petitioner's case and the sequence of events which led to the dismissal.

litigation process. As noted in Judge Anderson's March 18, 1996 Order Dismissing Action with Prejudice in the USC case,[6] the petitioner has an understanding of the law and has been involved in at least seven cases in this district and as many as twenty-one nationwide. Her experience with and knowledge of the law, as well as the nature of the abusive tactics she pursued inexorably in this litigation, make it obvious that her behavior in obstructing the discovery process was intentional. As noted in Judge Anderson's July 19, 1996 Order at page 6, the petitioner's "litigation history, considerable intelligence and demonstrated legal ability" compel the conclusion that her "behavior was not caused by ignorance of the proper standards but was a matter of bad faith."

Further, the petitioner's actions of, *inter alia*, refusing to respond to discovery, providing evasive answers to discovery, shouting insults at the respondents' counsel and the special master, failing to appear for her deposition, refusing to answer questions in her depositions, providing wholly evasive answers in her depositions, engaging in behavior during her deposition which the special master found to be "physically threatening," failing to return after a break in her deposition, failing to provide an adequate log which would enable the

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[6]In his July 19, 1996 Order Re Motions for Dismissal in the Attorney General case, Judge Anderson noted that, as there are certain common issues in the dismissal of the USC and Attorney General cases, particularly with regard to the bad faith and "less drastic sanction" factors, he would rely on and incorporate certain findings from the dismissal order in the USC case into the July 19, 1996 dismissal order in the Attorney General case.

respondents' counsel to decipher her eventual document production, claiming that her responsive documents were "massive" and required "earth moving equipment" to transport them, when in fact the documents numbered merely 713 pages, failing to produce a sufficient privilege log, failing to appear in court due to "illness," when she had been at the respondents' counsel's offices on the same day, and refusing to comply with numerous court orders, exemplify bad faith.

B. Prejudice

The respondents were severely prejudiced by the petitioner's misconduct in that they were deprived of an opportunity to prepare a defense and subjected to significant and unnecessary expenses. The petitioner succeeded in providing the respondents with essentially no meaningful discovery while at the same time significantly driving up defense costs through her dilatory and abusive conduct. The petitioner's persistent reluctance to adequately respond to discovery requests, including interrogatories, requests for production, and deposition questions, necessitated numerous costly motions to compel and for sanctions as well as a succession of hearings. Despite the unprecedented degree of guidance provided by the court and the considerable efforts of the respondents' counsel, the petitioner delayed discovery until the original discovery deadline expired, was extended, and elapsed again. As the Magistrate Judge concluded in the USC case, it became evident that "no direct answers to the most basic of inquiries would ever be forthcoming." (March 18, 1996 Order Dismissing Action with Prejudice at page 22) Accordingly, the prejudice the respondents suffered is apparent.

C. Deterrence

The need for deterrence of the particular sort of noncompliance as occurred in the USC and Attorney General cases is clear. The petitioner is a prolific litigant, and her flagrant, inexorable abuses threaten the very integrity of the judicial system. Her misconduct in the Attorney General case, which occurred subsequent to the USC case, clearly established that only the most severe sanction was likely to have any effect. Further, the petitioner has been sanctioned in prior litigation, and clearly such sanctions failed to deter the abominable conduct she demonstrated in these lawsuits.[7]

D. Lesser Sanctions

In his March 18, 1996 Order Dismissing Action with Prejudice in the USC case, Judge Anderson sets forth numerous reasons as to why a sanction other than dismissal

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[7]In one of the cases in which the petitioner was sanctioned over three thousand dollars, the court stated: "Assa'ad [Faltas] has seriously abused the federal discovery rules and the processes of this Court. Assa'ad [Faltas] has imposed unjustified burdens upon the respondents and the Court. The Court, having for many months and on many matters given special consideration to the plaintiff's *pro se* status, having attempted to assist the plaintiff on repeated occasions, and having held the plaintiff to a far less stringent standard than attorneys, can no longer save the plaintiff from the expensive consequences of her own actions and abuses." (May 11, 1989 Order in Marie T. Assa'ad v. John Umstead Hospital, *et al.*, C-87-465-D, United States District Court for the Middle District of North Carolina, Durham Division).

with prejudice would be ineffective in this case. For example, with regard to monetary sanctions, previous such sanctions have failed to have any effect on the petitioner's conduct and she is unlikely to satisfy any monetary sanction. (She has failed to satisfy monetary sanctions issued in the USC and Attorney General cases,[8] including sanctions for Rule 11 violations and discovery abuses,[9] she filed three of her actions in the United States District Court for the District of South Carolina *in forma pauperis*, and she has often described herself as impecunious).

Judge Anderson further sufficiently and succinctly explains why lesser sanctions in the form of (1) an offset of any judgment she might receive, (2) issue preclusion, and (3) limiting the petitioner to trial against one or more respondents with evidence limited to those witnesses and documents as to which the court is satisfied that she gave adequate discovery in a timely manner would be ineffective. (See Judge

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[8]Although prior monetary sanctions related to the discovery process were subsumed into the order dismissing the Attorney General action, these monetary sanctions remained unpaid at the time of the July 19, 1996 Order.

[9]The Rule 11 sanctions remain in effect and have yet to be satisfied by the petitioner. The issuance of these sanctions was properly affirmed by the Fourth Circuit and the reasons for the grant of such sanctions are clearly set forth in Judge Anderson's November 20, 1995 Order Granting Rule 11 Sanctions and his January 30, 1996 Order on Rule 11 Sanctions, Motion to Strike, Manner of Service, and Discovery Issues.

Anderson's March 18, 1996 Order Dismissing Action with Prejudice at pages 23-24).

Moreover, the petitioner's misconduct during discovery in the Attorney General case is very similar to the misbehavior which led to the dismissal of the USC case. Virtually all of the discovery in the Attorney General case occurred **after** the Magistrate had recommended dismissal of the USC case, and much of it occurred after the court dismissed the USC case by Order dated March 18, 1996. Accordingly, despite the petitioner's awareness of the consequences of her abuse, the pendency of the Recommendation and Order of Dismissal in the USC case failed to deter similar behavior. It is clear that lesser sanctions will not suffice.[10]

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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[10]Additionally, the Fourth Circuit properly affirmed Judge Anderson's denial of the petitioner's motions for reconsideration of the dismissal orders in both the USC and the Attorney General cases. Judge Anderson set forth his reasons for the denial of the same in his July 11, 1996 Order on Plaintiff's Motion for Reconsideration in the USC case and in his August 16, 1996 Substituted Order Denying Plaintiff's Motion to Alter or Amend in the Attorney General case.

Respectfully submitted,

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APPENDIX

APPENDIX

FILED
JULY 11 1996

LARRY W. PROPES, CLERK
Columbia, S.C.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Soraya F. Fares and Marie-Therese Assa'ad-Faltas, MD, MPH [HEREINAFTER "Dr. Faltas"] on behalf of themselves and classes they represent,	) C/A No.: 3:94-1578-17
Plaintiffs,	)
The University of South Carolina [hereinafter "USC"] et al.,	)
Defendants.	)

ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION

This matter is before the court on plaintiff's motion for reconsideration of this court's order dismissing the present action. That order adopted the Magistrate Judge's recommendation that this action be dismissed for abuse of the discovery process and willful misrepresentations to the court. *See* Order filed March 18, 1996 ("Order of Dismissal"); Motion filed April 8, 1996.

The court has received and fully considered plaintiff's various briefings in support of her motion for reconsideration,[1] as well as defendant's memorandum in opposition (filed May

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[1]Plaintiff has filed the following documents which address the present motion: **(1)** "Dr. Faltas' Rule 59(e) Motion and Preliminary Brief to Alter Judgment" (filed April 8, 1996 -- 7 pages plus attachments); **(2)** "Dr. Faltas' Errata to her Rule 59(e) Motion" (filed April 9, 1996 -- 2 pages plus attachments): **(3)** "Dr. Faltas' Supplemental Briefs in Support of her Rule 59(e) Motion [;] First Supplemental Brief: Summary of Supplemental Arguments and Motion to Supplement the Record of this Case" (filed May 2, 1996 -- 3 pages plus attachments); **(4)** "Dr. Faltas' Supplemental Briefs in Support of her Rule 59(e) Motion [;] Second Supplemental Brief: On Wit Culture and Courage" (filed May 2, 1996 -- 3 pages plus attachments); **(5)** "Dr. Faltas' Reply to Defendants' Opposition to her Rule 59(e) Motion (Part I)" (filed June 3, 1996 -- 2 pages); and **(6)** "Dr. Faltas' Motion for an Extension for her to File Part II of her Reply to Defense's Opposition to her Rule 59(e) Motion" filed June 3, 1996 -- 1 page). The court denied plaintiff a further extension to file this "Part II" of her reply, based on the many extensions previously granted and the court's determination that the matters sought to be briefed were not relevant to the present determination. *See* Order Denying Extension of Time filed June 11, 1996. *See also* "Plaintiff's Motion for a Third Brief Extension of Time to Submit a More Detailed Brief . . . " (filed April 29, 1996, and granted April 30, 1996). Plaintiff's thereafter filed a document entitled "Supplement to Plaintiff's Response to Rule 33 Interrogatories" (filed June 17, 1996) which the court has also considered in resolving plaintiff's present motion.

29, 1996). For the reasons stated below, the court has determined that its prior order should not be modified except as to the relatively minor matters set forth below under the heading "Modifications and Supplementation."

DISCUSSION

The court will not attempt to address each of plaintiff's arguments, as most have previously been addressed by the court in its earlier order. Several, however, deserve comment.

Plaintiff's Pattern of Behavior

Throughout her motion for reconsideration, plaintiff takes isolated comments by the court out of context and implies that the court's decision to impose the sanction of dismissal was based on a few isolated incidents. The reverse is true.

The record clearly demonstrates that plaintiff engaged in a pattern of behavior calculated to avoid any meaningful discovery. While constantly complaining about the expense to the taxpayer of defending the present and other cases, plaintiff has done everything in her power to drive up the costs of litigation. She avoided or substantially delayed providing answers to interrogatories and documents responsive to requests for production, ultimately arguing that the defendants could get the information in her deposition. In her deposition, however, plaintiff continued to engage in a pattern of providing largely evasive or nonresponsive answers. Plaintiff persisted in this pattern despite judicial supervision. It was the totality of this pattern of behavior (which became particularly apparent at the close of discovery), coupled with misrepresentations to the court (particularly regarding documentary support for her claims which also became apparent at the close of discovery),

which led the magistrate to recommend the present sanction and this court to adopt it.[2]

The impact of plaintiff's pattern of delay and evasion of discovery is demonstrated by one of plaintiff's present arguments. Plaintiff argues that even if defendants' had obtained her younger sister's name and address in plaintiff's deposition, it would have done them no good as the time for discovery was over as of that time and as she would have instructed her family members not to speak with defense

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[2]In regard to documents, plaintiff suggests that the court is punishing her for not properly calculating the number of documents during a hearing (regarding the number of unprivileged documents ultimately produced) or for not keeping better notes (regarding the documents as to which plaintiff claimed a privilege and which were provided to the court for *in camera* review). Again, this mischaracterizes the record. Plaintiff had effectively delayed discovery and caused the magistrate to make numerous accommodations to facilitate plaintiff's repeated claims of "massive" documents in support of her claim. When the day came for that production and defendants sent a courier to plaintiff's home, plaintiff refused to comply, suddenly claiming only a relatively few documents existed. Similarly, in regard to the privileged documents, plaintiff had been repeatedly asked to complete a proper privilege log. The proffered logs repeatedly failed to comply with the magistrate's order and plaintiff repeatedly delayed production for *in camera* review. The documents ultimately provided to the court demonstrated the totally disingenuous nature of plaintiff's prior representations of the nature of the documents and the burden in assembling them.

counsel. *See* Plaintiff's April 9, 1996 memorandum at 1. This type comment only confirms the court's conclusion that plaintiff's pattern of behavior was not a matter of misunderstanding the system, but a deliberate attempt to manipulate it.

The frequency with which and degree to which plaintiff violated the clear intent of the Magistrate Judge's various orders leaves this court with the firm conviction that plaintiff's behavior was not only deliberate and egregious, but deserving of the very severe sanction imposed by this court. As noted in the Magistrate Judge's Report and Recommendation and this court's Order of Dismissal, there are instances in which the court's mandate could not have been clearer yet plaintiff violated the order. One example is found in plaintiff's failure to produce documents to defendants when the court set a specific date for production and required defendants to make numerous accommodations to plaintiff to facilitate the production (including sending a courier to her home to help with the supposedly massive documents).

Far more numerous, however, are instances in which plaintiff clearly evaded the spirit and intent of the Magistrate Judge's orders, complying only with portions of the form and none of the substance. Plaintiff apparently believed that by doing so she placed herself in a position to argue that she had simply misunderstood the process or had some other excuse for her failure to comply. Her supplemental interrogatory responses which add only minimal information to patently defective responses after a court order for supplementation are examples of this behavior.

Had such behavior occurred once, or even a few times, this court might not have seen it as a deliberate pattern of behavior.

The frequency of these forms of noncompliance, however, along with the degree of the noncompliance convince this court that plaintiff's behavior was a deliberate attempt to evade the discovery process and the authority of the court.

Prejudice to Defendants

Plaintiff also argues that the court has failed to make an adequate finding that the defendants have been sufficiently prejudiced by her actions to justify dismissal. Plaintiff bases this argument in part on a claim that the court failed to address the materiality of the information not provided.

Central to plaintiff's argument is her belief that the defendants know what they have done to her so they cannot be prejudiced by her failure to tell them what they already know. If the strength of a plaintiff's belief in her case were determinative, few defendants would be entitled to discovery. This is simply not the standard.

Plaintiff also seems to believe that the only way to find sufficient prejudice exists is to first rule out the possibility that the court might use other means to remedy or reduce the prejudice. In other words, if the court might resolve the prejudice by extending discovery and minutely managing it, then the "prejudice" evaporates. While a court must take such matters into consideration in deciding the appropriate sanction, this does not mean that no prejudice exists. In other words, prejudice is not eliminated just because the court might find some means of minimizing it.

While plaintiff's argument might be availing to reduce the sanction in some cases, the particular circumstances of the present case demonstrate why this is not appropriate. In the

present case, the court had already extended and micro managed discovery. Despite this, plaintiff's pattern continued. As a result, the costs to defendants were increased dramatically and a wholly unreasonable burden was imposed on the court. Given her financial status, there is no way for the court to shift these costs back to plaintiff except through offset against any possible recovery. This results in a no real downside for plaintiff. What plaintiff suggests then, would allow her to effectively evade punishment for her behavior while imposing a mounting burden on the defense and the court.

In any case, the court found prejudice to defendants based, *inter alia*, on the fact that plaintiff claimed to know of a variety of witnesses yet failed to fairly or timely identify these persons. The court cannot know what, if any, testimony these witnesses may have offered. It might support plaintiff, or might include information or admissions helpful to defendants. Having only partially identified these various witnesses, plaintiff should not be allowed to rely on her own failure to further identify them as a basis for claiming lack of showing of materiality.

Also in regard to the witness issue, plaintiff incorrectly focuses on the single question of whether she identified one or both sisters as possible consulting physicians. This takes the court's reference to the sisters totally out of context. The court's comment was directed at plaintiff's pattern of distorting the record. Whether plaintiff had stated that she had consulted one or both sisters, and whether defendants might reasonably inquire about both (even if plaintiff had only named one) is, at most, a collateral point.[3]

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[3]In oral argument to this court, plaintiff indicated defendants were unreasonably inquiring into plaintiff's

Quite plainly, plaintiff has evaded providing adequate and timely responses as to numerous potential and named witnesses. *See* Order filed March 18, 1996 at 21-22. This is not her only failure to properly comply with discovery orders, merely an example of plaintiff's evasive behavior.

To require the court to make any more detailed finding as to prejudice, that is, to identify what the defendants do not know, is in essence to require the court to prove a negative. Plaintiff has alleged very broad claims against a number of defendants. These defendants have been unsuccessful in pinning down plaintiff's version of events, even after a five day deposition. It would be highly prejudicial to require them to go to trial still so unclear as to the basis of plaintiff's claims. While, as noted above, the court might minimize this prejudice to some degree by more judicial micro management of further extended discovery, this would impose another set of burdens on both defendants and the court. This should not be required under the circumstances of this case.

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personal family history. This was a distortion of the record which revealed that in addition to the normal reasons an opposing party might inquire as to the names and addresses of family members, plaintiff had claimed to have consulted one or more of her sisters in regard to her medical condition. Plaintiff had no other treating physician other than herself and had placed her medical condition in issue. While parts of the record may be susceptible to a reading that plaintiff consulted only one sister, the record also reveals that both sisters are physicians and the record is certainly not so clear as to rule out consultation with both. *See generally* Order of Dismissal at 11 and at Appendix A.

Litigation History

Plaintiff also suggests that the court has taken her litigation history into consideration as a reason to impose punishment. As the court carefully pointed out in its order of dismissal, plaintiff's litigation history has been considered for two very limited purposes. Order of Dismissal at 2 n. 1. First, the court looked to plaintiff's extensive litigation history in determining that she was not a novice in the discovery or litigation process. Second, the court considered plaintiff's litigation history, and the likelihood that she would continue to be a litigant, in determining the need to deter similar unacceptable conduct. The court sees no reason to modify these findings.

MODIFICATIONS AND SUPPLEMENTATION OF ORDER OF DISMISSAL

Correction of Litigation History

In her Supplement to her Rule 33 responses (filed June 17, 1996), plaintiff brings to the court's attention an omission from the court's recitation of plaintiff's litigation history. That is, the history fails to include a matter captioned *Fares and Assa'ad v. Whitney and Liberty Mutual Insurance Company*. This matter involved a motor vehicle accident and was, apparently resolved by arbitration. The documents provided to the court indicate that the arbitrator found for Dr. Faltas (Assa'ad) or her mother (Fares) in regard to the property damage claim but against Dr. Faltas as to any emotional distress claims. It is unclear from plaintiff's submission whether this was simply an insurance dispute sent to arbitration or whether it was, at some point, a matter pending in a court. The documents indicate only that the arbitration was conducted in "Wake County Courthouse" and had a Docket number "A077/00012/88." *See* Supplement to

Plaintiff's Response to Rule 33 Interrogatories (filed June 17, 1996).

Based on the receipt of this information from plaintiff, the court hereby amends its prior reference to plaintiff's litigation history found at pages five through six (note 2) in the Order of Dismissal, to include the above referenced matter. Given the reason for the court's discussion of plaintiff's litigation history, this addition requires no further modification of the original order.

Supplementation of Record

Plaintiff also asks the court to supplement the record to include two letters which were previously submitted to this court for *in camera* review.[4] These include: A January 4, 1994 letter from Walter Parham to Edward Turbeville; and an October 27, 1993 letter from Victoria Eslinger to a representative of the University of South Carolina. The court finds this request to be reasonable and, therefore, will require defendants to submit these documents, under seal, for whatever future review of may be had.

CONCLUSION

For the reasons stated herein, plaintiff's motion for reconsideration is denied except to the extent that the court

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[4]This court recalls that these letters were submitted for review in a related case, not the present case. Nonetheless, the court will direct that they be made part of the record in the present case, to be filed and maintained under seal absent further order of this court.

amends its recitation of plaintiff's litigation history to include the matter listed above and directs defendants to file, under seal, the two letters referenced above. This matter is, therefore, dismissed with prejudice for the reasons stated in the court's order of March 18, 1996 as further explained above.

IT IS SO ORDERED.

/s/_____
Joseph F. Anderson, Jr.
United States District Judge

July 11, 1996
Columbia, South Carolina

FILED **LARRY W. PROPES, CLERK**
AUGUST 16 1996 **Columbia, S.C.**

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Marie-Therese Assa'ad-Faltas, MD, MPH Plaintiff, The Attorney General of Virginia for the Commonwealth of Virginia, and Carol Nance, in both her individual and official capacities; Bobby Gist, David Sheridan, Patrick Barrissi, Judy Weeks, J. O'Neil Humphries, Laurence Dark, Joan Altekruse, Ernest Altekruse, Richard Creswick, and Randall Chastain, in their individual capacities, The Law Firm of Nexsen, Pruet, Jacobs & Pollard [hereinafter NPJP], in its corporate capacity, and Victoria Eslinger, Susan McWilliams, John Trussell, and Edward Turbeville, in their individual capacities; The State Newspaper in its corporate capacity, Katherine Gray, Claudia Smith Brinson, Patrick Blanchat, Thomas McLean, and William Rhone, individually and as agent of The	C/A No.: 3:95-1521-17

State Newspaper; and Chris Riley and other unknown-named persons,

Defendants.

**SUBSTITUTED*
ORDER DENYING PLAINTIFF'S
MOTION TO ALTER OR AMEND**

*Due to printer error, the original order dropped several lines. This order is substituted.

Presently before the court is plaintiff's motion to alter or amend the judgment in this case. Underlying this motion is a request that the court reverse its earlier orders dismissing various defendants and claims, reverse its award of sanctions, and reverse its dismissal on grounds of discovery abuse. Also before the court are a variety of related motions or submissions. For the reasons discussed below, the court denies plaintiff's motion to alter and amend. The remaining procedural motions are mooted.[1]

Although it forms no part of the reason for denial of the motion for reconsideration, the court will also address plaintiff's manner of submission of the present motion. The court does so in hopes that this discussion will guide plaintiff in any future filings in this or any related matter.

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[1]The court had neared completion of this order prior to receipt of defendants' memorandum in opposition. The court has, however, reviewed the defendants' brief and sees no further matters that need be addressed.

Manner of filing documents

It is strongly the court's preference (if not the requirement of the Local Rules) to receive a single memorandum in support of a given motion, even if filed on the last day of the allowable period. This means one entry for the Clerk of Court's office, and only one initial memorandum for the court to match up with whatever responsive memorandum may be received. A single unified filing also reduces the handling of paperwork and clarifies the time for response.[2]

Despite this court's numerous prior indications to plaintiff that her practice of filing numerous documents (in situations similar to the present) places an unnecessary burden on the court, she has filed ten (10) separate documents as initial support or otherwise related to her present motion to alter or amend. Many of these documents have been filed on the same dates, making reference even more complex.[3]

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[2]The confusion this can cause is demonstrated by plaintiff's present multi part filing. For instance, while plaintiff indicated an intent to file a Part I-C, none of the documents is so labeled. There is, however, a document with no "Part" designation. Similarly, there are two documents labeled "Part II." Plaintiff has since indicated one is really "Part III," but the court cannot tell which one. Not only is this confusing for the court but it would be for the responding defendants.

[3]Without reiterating the generally lengthy titles of these various documents, they consist generally of the following: Parts I-a and I-b of the motion to reconsider (both filed July 29, 1996); Part I-d (filed August 6); two documents labeled

In case it has not been clear to plaintiff before, this court will reiterate that it will not tolerate this or similar practices. Absent extraordinary circumstances, plaintiff may file one memorandum in support of any given motion. She may likewise file, at most, one memorandum in reply absent extraordinary circumstances. In the future, this court may well refuse to consider any but the first document so filed in this or any other matter. *See generally* Fed. R. Civ. P. 12(g) (requiring that certain motions raised before answering or combined with the answer be consolidated in a single filing); Local Rule 12.04 (referring to "*an* accompanying memorandum" for motions); Local Rule 12.07 (discouraging replies and limiting them to new matters raised by the opposition).

Part II (both filed August 2, 1996 -- one of which plaintiff later indicated was Part III, without indicating which document that would be); and what may be Part I-C (though not so labeled) relating to the application of Fed. R. Civ. P. 11(c)(1)(A) (filed August 6). Thus, the court has six (6) separate documents from plaintiff dealing with the substance of the motion, even before any reply which she might file to any opposing memoranda. In addition, the court has received four (4) other documents (one on July 29, two on August 2, and one on August 6) variously: warning the court of plaintiff's intent to file multiple subparts while imploring the court not to consider any portion until all are received or the time for filing expires; a prayer for a hearing or "particularly serious consideration" of the motions for reconsideration of the sanctions and costs previously imposed; and correcting the title of an earlier motion. Further, two of the later four are labeled or appear to be intended as separate motions which creates even more confusions and unnecessary burden on the court.

In the present case, despite the fact that plaintiff has unreasonably burdened the court by her manner of filing, the court has considered each and every document the plaintiff has filed. This makes moot that motion filed July 29, 1996 which is captioned "Plaintiff's Motion for the Court to not Consider Parts I-a, b of her Rule 59(e) Motion, Until All its Parts Are Filed or Until the Time for Such Filing Expires." The court has, further, seriously considered the present motion for reconsideration but sees no reason for any further hearings. Therefore, to the extent it might be considered a separate motion, "Plaintiff's Prayer for a Hearing on, . . . Her Rule 59(e) Motion on the Rule 11 Sanctions and for Relief from Taxation of any Costs to Her" is also now moot. Motion filed August 2, 1996.

The substantive portions of plaintiff's motion for reconsideration are discussed below. The court will address these by general subject matter.

I. DISMISSAL BASED ON PLAINTIFF'S ABUSE OF DISCOVERY PROCESS

A. Materiality of information not discovered

In Part I-a of plaintiff's motion, she challenges the court's July 23, 1996 order which dismissed whatever remained of the present action. This dismissal was based on plaintiff's abuse of the discovery process. Very little of this argument requires any response whatsoever as plaintiff is merely rearguing points addressed by the court in its earlier order. The court will, however, take this opportunity to clarify a few points plaintiff clearly misunderstands or misstates.

First, plaintiff states that the court rejected Rule 12(b)(6) motions in this case and implies that this was the sole proper means for defendants to pin down the basis of plaintiff's many broad allegations. Factually, this statement is only partially correct. As to the remaining claims against the remaining defendants, this court either rejected Rule 12(b)(6) motions or none were made. Numerous other parties and claims were, however, dismissed under Rule 12(b)(6).

Similarly, plaintiff's legal argument is frivolous. Discovery is often necessary to pin down the factual basis of claims under the liberal pleading provisions of the Federal Rules of Civil Procedure.

The remaining arguments seem primarily to argue the merits of plaintiff's various claims, apparently in an attempt to demonstrate that defendants were not prejudiced because they were not denied discovery which was necessary to their defense. Plaintiff misconstrues the law in these arguments.

For example, plaintiff refers to certain statements allegedly made by defendants which she claims were defamatory *per se* in that they alleged mental illness or professional incompetency. She then argues that no discovery was necessary as to these claims because defendants must defend themselves solely based on what they knew at the time. In part, plaintiff bases this argument on a misinterpretation of the law which would, in her view, eliminate the truth defense.[4]

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[4]Plaintiff incorrectly suggests that truth is not a defense to a defamation *per se* case. This misconstrues the difference between the availability of the defense and the burden of establishing it. *See Beckham v. Sun News*, 344 S.E.2d 603,

In portions of her deposition which this court viewed, however, it was clear that plaintiff refused to provide reasonably requested detail as to what statements she believes were made, to whom, when, and who the witness to these statements may be. Further, throughout discovery, plaintiff resisted providing information which would relate to her mental health (either as it relates to the truthfulness of this claim or her claimed damages) and any problems relating to her professional competency. These factual matters are material to: whether any of the alleged statements were, in fact, made and, if so, the degree and nature of the publication; the truthfulness of whatever statements defendants may have made; and what damages plaintiff may have suffered as a result of any defamatory statements.

Similarly, plaintiff's reliance on *McKennon v. Nashville Banner Pub. Co.,* 115 S. Ct. 879 (1995) is misplaced. *McKennon* was a Title VII case which, at most, is applicable to this case by analogy. More significantly, *McKennon* does not stand for the proposition which plaintiff suggests which is that after-discovered evidence of wrongdoing by or incompetency of an employee has no relevance in a discharge action and is, therefore, protected from discovery. Quite the contrary, *McKennon* held that although after-discovered evidence of employee misconduct could not bar relief altogether, it could bear on the appropriate remedies. 115 S. Ct. at 885-87.

In short, the arguments made by plaintiff are based on incorrect interpretations of the cases on which she relies and do nothing to persuade this court that the information she avoided disclosing (either by her evasive answers, to written discovery

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604 (S.C. 1986).

requests and in her deposition, or by her unilateral termination of her deposition), was not material to the defense of this case. Moreover, plaintiff's arguments fail to dissuade this court from its firm conviction that plaintiff has deliberately evaded the spirit and letter of the discovery provisions of the Federal Rules of Civil Procedure and this court's many prior orders giving guidance as to discovery (which orders were frequently issued at plaintiff's request).

Finally, to the extent plaintiff is using this motion to reargue dismissal of the earlier action captioned *Fares & Faltas v. The University of South Carolina,* CA No. 3:94-1578-17, which she clearly appears to be doing, her position is rejected. The court has already denied plaintiff's motion for reconsideration of the dismissal of that matter which was dismissed on similar grounds.

For the reasons discussed above, this court remains convinced that defendants have been materially prejudiced and that no lesser sanction than dismissal is adequate to remedy the present or deter similar conduct by plaintiff. In addition, this court remains convinced that the sanction is the only one adequate to punish plaintiff's utter disrespect for the court and, therefore, to preserve the authority of the court.

B. Criticism of the special master and this court's treatment of plaintiff's disrespect for him

In Part I-b of her motion, plaintiff seems to argue that the court improperly: (1) relied on the special master; (2) delegated its power to him; and (3) took unreasonable offense at plaintiff's disrespect directed towards the special master.

The special master was appointed pursuant to this court's authority under Rule 53 of the Federal Rules of Civil Procedure. Once appointed, the special master served as an arm of this court and was to be accorded the same respect and obedience within the scope of his delegated powers. His powers related, specifically to oversight of all aspects of the conduct of the deposition. While this court made provision for certain appeals to it after the conclusion of the deposition, it made clear that the special master's rulings were to be obeyed. In any case, the record is clear that the special master obeyed his instructions and remained within the delegation of authority given him.

In numerous ways clearly demonstrated by the videotape record of the deposition, plaintiff treated the special master in a contemptuous manner. She disobeyed his rulings including by failing to return for the continuation of her deposition after being ordered to do so. She further treated him with disrespect in her written submissions. Her protestations to the contrary do not change the clear record.

Were this court to allow behavior such as plaintiff directed to the special master, as well as her disobedience of his directives, it would destroy the very useful purpose served by Rule 53. In the present case, this would have precluded any meaningful continuation of the deposition after plaintiff's first walk-out or would have required the complete dedication of a judicial officer to oversee plaintiff's deposition. This is a wholly unreasonable result.

In this light, the court finds that there is nothing further it could or should do to allow completion of discovery. Plaintiff has chosen to abuse the discovery process and the indulgences of the court at every turn. Having chosen this path, she is in no position to cry foul when the court has finally had enough and

dismisses plaintiff's claims for abuse of the discovery process. To require any more would be to allow the complete manipulation of the system by plaintiff to the great disadvantage not only of the defendants but of the integrity of the court.

C. Plaintiff's concern for the court's conscience

The court has great difficulty understanding what plaintiff is arguing or seeking in Part I-d of her motion other than her suggestion that the court has generally treated her unfairly. The court has more than adequately addressed these points in its numerous earlier orders. The court would not, therefore, comment on this document but for the closing comment which reads as follows:

> Dr. Faltas ends by imploring the Court to ask itself seriously, nay imagine, how it would have *really* felt if she had stayed in her deposition and had a stroke or died; or been detained and raped; or committed suicide. The answer should assure this Court that, far from disrespecting it, she spared its Honor intolerable guilt.

This comment demonstrates the utter lack of logic in plaintiff's various positions, particularly as to her justification for leaving her deposition. Moreover, it demonstrates plaintiff's propensity for offering a shifting list of after-the-fact justifications, generally without any foundation, when all that was necessary was a timely notification to the special master of whatever concern plaintiff may have had.

The only even arguably relevant risk addressed is plaintiff's suggestion that she might have been at risk of a stroke or other medical problem. As this court discussed in its prior order, plaintiff did nothing to alert the special master to any such concern before leaving the deposition. Such notice would not only lend some credence to her current claim but would have allowed appropriate action (including possible confirmation) at the time. Her later reliance on this position cannot, therefore, be accepted by this court. Were the court to accept plaintiff's post departure claims of illness, any person claiming medical expertise could disobey court orders with impunity so long as they were willing to affirm (several days later when it can no longer be confirmed) that they were "ill at the time."[5]

Beyond the health issue, plaintiff's claims are utterly ludicrous flights of fancy that are, frankly, quite offensive to this court. For instance, the suggestion that plaintiff's departure from her deposition was justified by a fear or risk of detention, rape or suicide has no foundation whatsoever other than plaintiff's fertile imagination.

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[5]Plaintiff suggested in one recent document that the court should have sent "a medical truth squad" to her home if it did not believe her claim of illness. Beyond the Orwellian dimension and obvious constitutional concerns with this approach, it lacks any logical basis. First, plaintiff did not make clear that she was claiming illness at all until the next morning. Even then, her only specific reference was to vocal cord injury. It was not until later that the blood pressure issue was even raised. Even were these problems overcome, the court cannot see why it should be required to go to any such lengths to save a civil litigant from her own flagrant disregard for the authority of the court and its special master.

Further, plaintiff did not suggest any concern about detention, rape, or even suicide to the special master before her departure as a reason for leaving the deposition. Neither did she suggest such a fear to this court in her subsequent motion to terminate or arguments related to the same. Indeed, to the best of this court's recollection, it saw the suggestion of a concern about rape for the first time in the past week and only as a rationale for plaintiff refusing to read her deposition transcript in the court reporter's home because there was no one else present.[6]

The court is, in fact, quite at a loss as to the specific basis of this fear. Certainly, it cannot be based on the document plaintiff attaches to this portion of her motion, a newspaper report appearing months after the deposition ended.[7] It would also not logically be based on a fear of physical harm from those at the deposition. The deposition was being conducted

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[6]The circumstances relating to the reading and signing of the deposition have nothing to do with the court's dismissal of this action. To the extent the asserted fear relates to the reading and signing of the deposition, therefore, this court will only note that there is nothing to spur this fear other than plaintiff's wild conjecture as to what *could* happen were she alone with a man.

[7]Plaintiff attaches to her motion a newspaper clipping from August 2, 1996, (four days before this portion of the motion was filed) which contains a short article titled "Inmate faces rape charges in attack on female prisoner." This has no bearing whatsoever either on the circumstances of plaintiff's deposition or even the basis of any fears she may have had when her deposition was conducted. (Mid-May 1996).

with at least six people present, half of whom were women and many of whom are officers of the court (four attorneys, a videographer, and a stenographic court reporter).

Similarly, plaintiff could not reasonably have based her now asserted fear of detention on Mr. Potts' suggestion shortly before that it might require a criminal contempt sanctions ("24 hours in a jail cell") to gain plaintiff's compliance with the special master's orders. Plaintiff was well aware that this was no more than a suggestion which was, at best, unlikely to result and certainly could not have occurred without a prior hearing. As the special master advised plaintiff, he had the power to *recommend* sanctions. In any case, a fear that the court might impose incarceration as a sanction for contempt would not justify flight. Otherwise, every criminal defendant could justify the same.

If, on the other hand, plaintiff is referring to some concern about walking to her car later in the evening, this court has no doubt whatsoever that one or more persons present at the deposition would have seen her safely to her car at the conclusion of the deposition had she expressed such a concern. Under the circumstances, this would have been perfectly adequate protection.[8]

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[8]This court understands that plaintiff was provided with handicapped parking next to the building where the deposition was being conducted. Her trip to her car would, therefore, have been short at worst. Further, given the time of year, the deposition would have needed to continue for several more hours before darkness would have been a concern.

For all of the above reasons, the court finds plaintiff's newly asserted "detention or rape" concern (and likewise the suicide concern to which this court does not recall any prior reference) utterly disingenuous. This court finds no reason to modify its prior ruling based on some later offered speculative "guilt trip" that plaintiff would like to conduct for the court.

II. THE PROPRIETY OF THE EARLIER RULE 11 SANCTIONS.

Plaintiff argues in one of the documents labeled "Part II" (filed August 2, 1996) as well as in an August 6, 1996 submission, that the court improperly imposed monetary sanctions for Rule 11 violations on her because she is immune from liability for legal arguments made by her lawyer in the complaint. The court will address this argument even though plaintiff did not raise it at the appropriate time (when the sanctions were under consideration or in the earlier motion(s) to reconsider imposition of sanctions or the dismissal motions on which they were based.

The specific provision on which plaintiff relies reads as follows: "Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2)." Fed. R. Civ. P. 11(c)(2)(A). Subdivision (b)(2) requires that "claims, defenses, and other legal contentions [in a signed filed document, or later advocacy] are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. P. 11(b)(2).

Plaintiff's reliance on this subsection are misplaced for several reasons. First, although plaintiff was represented at the time the complaint was filed, she was not represented when she

later continued to vigorously advance the claims in the complaint both in oral argument and in written opposition to the defendants' dispositive motions.[9] Plaintiff's advancement of

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[9]This action was initially filed by counsel. The court granted counsel's request for the matter to proceed in forma pauperis. Within forty-five days thereafter, plaintiffs ought to consolidate this case with another within which she was proceeding pro se and sought to be allowed to sign pleadings in the proposed combined action on her own. The court denied this motion. Immediately thereafter, plaintiff's attorney sought to be relieved as counsel. Notably, this is the first document which appears to have actually been prepared by counsel (different type style, double spaced). This motion was granted.

In the interim between when counsel filed his motion to be relieved (July 7, 1995) and the date the court granted this request, counsel continued to sign all documents but they appear from form and type style to have been prepared by plaintiff. After August 24, 1995, plaintiff appears to have signed all pleadings including a combined response to all defendant's dispositive motions (which was filed on September 21, 1995. She filed a second memorandum of the same nature on September 28, 1996. Her former attorney filed some subsequent documents but only regarding sanctions motions which were asserted, in part, against him.

In addition, plaintiff argued the dismissal motions orally before this court and essentially reargued them in the Rule 11 proceedings. See generally, Documents signed by plaintiff filed September 28 and October 30, 1995 (Opposition to Rule 11 motions). November 2, 1995 (motion

the claims included, in some instances, motions for reconsideration filed after the court's dismissal of various claims and imposition of sanctions. Later advocacy is an independent basis for the imposition of sanctions as noted in the initial paragraph of subsection (b).[10]

Second, the imposition of sanctions against plaintiff was, at least in part, based on certain of her factual assertions which proved to have no foundation whatsoever. Rule 11(c)(2)(A) has no applicability to factual assertions.

Most of the remaining arguments regarding Rule 11 have been fully addressed in prior orders or simply justify no response. The court will, however clarify the reason it did not impose sanctions in favor of Ms. Eslinger as to all claims but did as to her law firm.

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to reopen summary judgment for one defendant), December 6 and 26, 1995 (opposing one Rule 11 motion and arguing for reconsideration of imposition of Rule 11 sanctions against plaintiff and her attorney). While plaintiff's arguments against Rule 11 sanctions are not themselves the basis for imposing sanctions, they provide a written record (in addition to the hearing transcripts of plaintiff's continued advancement of the legal positions advanced in the complaint.

[10]Although the court will not rely on this at this point, it notes that the complaint was clearly drafted by plaintiff who then convinced her attorney to sign the complaint despite certain misgivings on his part. The court's understanding on this point is based on arguments plaintiff and her attorney have made to the court as well as documents between them which they have submitted.

First, the court did award sanctions in favor of Ms. Eslinger, although not on one of the claims asserted against her. While that last claim was ultimately dismissed on summary judgment motion, the court found that the assertion of it did not rise to the level of sanctionable conduct. By contrast, there were a number of claims asserted against Ms. Eslinger and her employer (as this court read the complaint, both for Ms. Eslinger's conduct and conduct of others).[11] As to all these claims except the one referenced above, the court dismissed the claims on Rule 12(b)(6) or Rule 56 grounds and found the assertion of the claims sanctionable.

The fees awarded to Ms. Eslinger's employer were based on the claims for which it was independently dismissed. It would have no expenses as *respondeat superior* under the one remaining claim against Ms. Eslinger other than Ms. Eslinger's defense fees which were, as noted above, denied as to this one claim.

To the extent plaintiff continues her assertion that Ms. Eslinger's husband, another defendant dismissed from this action for lack of any factual or legal foundation, is responsible for Ms. Eslinger's actions, this argument is also unsupportable.

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[11]Plaintiff has since suggested that defendants and the court read her complaint too broadly. If so, the time for plaintiff to clarify the limited basis of the claims she was asserting was when faced with the first motion, argument, or document indicating a misunderstanding by the court or defendants. Quite the contrary, plaintiff only suggested this narrowing when the Rule 11 sanctions were raised. During other arguments, she had sought to broaden, not narrow, her allegations.

As the court previously advised plaintiff, the law of South Carolina has, for about a century, made clear that a husband is not responsible for his wife's judgments or debts (except in limited circumstances not relevant here). Plaintiff's current inference that the husband is the wife's "employer" (by arguing based on a *respondeat superior* theory) is equally unsupportable. Therefore, the sanctions awarded in his favor are not dependant on the disposition of the claims against Ms. Eslinger.

Plaintiff also argues that the court had a duty to dismiss her claims under 28 U.S.C. § 1915(d), if at all, and that because the claims were not dismissed prior to service, the court is precluded from imposing Rule 11 sanctions. Such an interpretation would turn a tool available to courts to protect defendants from frivolous claims into a shield to protect the filers of frivolous claims. Clearly, that is not the intent of this rule. Plaintiff's interpretation would, moreover, seriously impair significant due process rights of the defendants. It would also impose an incredible burden on the courts, deny the court the advantage of briefing by the parties when that would be helpful, and delay the service of most *in forma pauperis* complaints.

Not only is this court confident that none of these results was intended by Section 1915(d), but it is confident that plaintiff knows it. Clearly, she did not raise this argument at any earlier time despite her clear familiarity with the *in forma pauperis* provisions.

For the reasons discussed immediately above, the court finds no reason to modify its decision to impose Rule 11 sanctions.

III. THE COURT'S DISMISSAL OF VARIOUS DEFENDANT'S AND CLAIMS ON RULE 12(B)(6) AND 56 GROUNDS.

In what is, perhaps, intended as "Part III" (labeled as Part II and filed August 2) plaintiff challenges the court's earlier dismissal of various claims and defendants under Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure. The reasons for these dismissals were set out in various earlier orders, most of which were issued at least six or more months before the present motion. Plaintiff has also reargued some or all of these motions in one form or another. This court will not, therefore revisit these issues except as to the few points addressed below.

Plaintiff again argues, as in the submission discussed above, that once the complaint passed § 1915(d) muster, the court could not, on its own, raise a question as to the viability of a claim. Specifically, plaintiff seems to be referring to the court's various *sua sponte* orders of dismissal of various claims. The court does not see why, if it has authority to dismiss claims under 1915(d) before service, it cannot raise the same concerns later when it has had an opportunity to delve into the complaint and sort out the large number of overlapping claims to determine which are viable. In the present case, the court dismissed a number of claims relating to parties who had not yet appeared and which claims duplicated others the court had dismissed as to other parties on the same grounds. Certainly it was in the interest of judicial economy to do so.

If plaintiff felt this procedure precluded her from presenting legitimate arguments as to why dismissal was improper under 12(b)(6), she could have promptly brought that to the court's attention rather than relying on a procedural

challenge many months later after all the remaining claims have been dismissed for discovery abuse. In any case, plaintiff does not, in the present motion, raise any legal arguments relating to these claims which convince the court that it erred in its earlier dismissal of these claims.[12]

As to plaintiff's suggestion that the court made some egregious error by allowing defendants a two-day extension which matched plaintiff's two-day extension of the same deadline in which to brief the viability of the claims against one defendant, the court can only comment that it wanted simultaneous briefs. Therefore, to give plaintiff an extension, it necessarily had to give defendants the same extension. If the court made an error in granting this extension, it was in allowing it based on plaintiff's wholly unspecified "*quasi*-malfunction" of her computer. Even were the court somehow wrong in its decision, it can hardly imagine that this had any adverse impact on plaintiff.

Finally, the court believes that the reason for the ultimate dismissal of this case, an egregious pattern of discovery abuse, would justify dismissal of all claims against all defendants even if these defendants or specific claims against remaining defendants were not already dismissed. Certainly, this should apply as to any claims earlier dismissed against those defendants who remained in the case on other claims. This is

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[12]Plaintiff attaches several documents in support of this portion of her motion including a letter, an affidavit and a newspaper article. To the extent they have any relevance to the present motions, they do not support plaintiff's position. In any case, these documents would be inappropriate to consider as to any Rule 12(b)(6) motion.

because, under the unique circumstances of this case, the allegations are so overlapping and intertwined and the discovery abuse is so pervasive, that the court cannot reasonably imagine that plaintiff's actions would not have been wholly the same had all claims remained in against all defendants.[13]

Conclusion

For the reasons discussed above, this court denies plaintiff's motion to alter or amend the judgement. The motions for the court to delay consideration of any parts of the motion until all are received and the motion for a hearing or "particularly serious consideration" are moot.

IT IS SO ORDERED.

S/_____
Joseph F. Anderson, Jr.
United States District Judge

August 14, 1996
Columbia, South Carolina

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[13]While perhaps not a proper consideration here, the court notes that the expenses of defense, which have been driven up unreasonably by plaintiff's behavior, would likely have been borne in large measure by the same entities as to all claims against many of the defendants earlier dismissed.

Supreme Court, U.S.
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No 98 - 2001

IN THE
SUPREME COURT OF THE UNITED STATES

Marie-Thérèse Assa'ad-Faltas, MD, MPH
[hereinafter "Dr. Faltas"],

Petitioner,

v.

The University of South Carolina
[hereinafter "USC"], *et al.*

Respondents.

and

Marie-Thérèse Assa'ad-Faltas, MD, MPH
[hereinafter "Dr. Faltas"],

Petitioner,

v.

The Attorney General of Virginia
for the Commonwealth of Virginia; *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION
TO THE PETITION FOR A WRIT OF CERTIORARI

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13 pp

QUESTIONS PRESENTED

1. Does Title VII prohibit *quid-pro-quo* discrimination by religion as it does with sex?

2. Does the crime-fraud-*or-tort* exception pierce the attorney-client privilege and render an attorney liable to a non-client if he advises a client to violate Title VII to the non-client's damage?

3. In a Title VII case, is the employer concluded by its own internal review process if such process finds no performance reason for the adverse employment action against the employee?

4. Do this Court's holdings in *Faragher v. Boca Raton* and *Burlington Industries v. Ellerth*, 66 LW 4634 and 4643 (1998), prohibit the employer from taking the employee's demand for safeguards against recurrence of the Title VII violations as a rejection of an offer of reinstatement?

5. If the answer to questions 3 and 4 above is positive, does this Court's holding in *McKennon v. Nashville Banner*, 63 LW 4105, 115 S.Ct. 879 (1995), limit trial, and perforce discovery, in a case as here presented to the issue of damages, deeming liability established as a matter of law?

6. Since education is compelling thought, and educational testing is compelling speech, can states operate universities as their *alter egos* without violating the First Amendment that prohibits government from compelling speech no matter how "correct" or salubrious that speech is?

7. Does the Republican Form of Government, guaranteed to each state under Title IV, Section 4, of the Constitution of the United States, prohibit a state attorney general from *totally* abdicating to a private lawyer the determination of what the state's litigation position should be in civil suits?

8. Do Article III of the Constitution of the United States and this Court's unanimous holdings in *Mathews v. Weber*, 423 U.S. 261 (1976), and *Gomez v. U.S.*, 490 U.S. 858 (1989), require those United States Courts of Appeals that decide to *totally* abdicate the adjudication of certain appeals to their Office of Staff Counsel to first obtain the consent of the parties to the appeal and allow them to object to the Office of the Staff Counsel's proposed dispositions of such appeals?

9. Do mere acts of arguing that the answers to questions 2 and 7 above should be positive and suggesting early settlement negotiations warrant Rule 11 sanctions on a plaintiff or her lawyer?

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Respondents' Brief Adds Reasons to Grant the Writ

I. It Shows such Departure Below as Warrants an Exercise of this Court's Supervisory Power.

A. Supervision of Lower Courts is Integral to This Court's Function.

While this Court cannot realistically review every decision below that shocks the conscience, periodic *sampling* of the lower courts' work could maintain the vigor of this Court's supervisory power—without which all lower courts would be free to ignore this Court's holdings.

This Court's extensive jurisprudence on extra-ordinary writs shows its correct willingness to use its supervisory powers to make lower courts obey its orders in the cases it decided. But this Court does *not* sit for the *sole* benefit of the few parties to the *selected* cases it decides. *It sits for the benefit of the whole nation throughout its history.* What is sought here is *not* an extraordinary writ but a writ of *certiorari* on novel questions of extreme constitutional and practical importance.

But even if the sole issue were the lower courts' departures from this Court's entire jurisprudence on recusal, on Title VII, on discovery, and/or on limits to delegation of Article III powers, *certiorari* would still be justified under this Court's own Rule 10(a), which provides:

> The following . . . indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has . . . so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

The departing courts' *rationale* matters not. "'[T]his Court,' however, 'reviews judgments, not opinions.' *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)." *Texas v. Hopwood*, 116 S.Ct. 2581 (1996) (Opinion of Justice Ginsburg, with whom Justice Souter Joins, respecting denial of petition for a writ of certiorari).

Questions 1-7 and 9, presented in the Petition for a Writ of Certiorari [hereinafter PETITION] are properly raised in Petitioner's complaints, motions and arguments, before the U.S. District Court (D.S.C.) and fully preserved in her briefs to the U.S. Court of Appeal (4th Cir.).

The Court of Appeals' failure to *opine* on them cannot foreclose this Court's review; rather, it created Question 8. The Brief in Opposition [hereinafter OPPOSITION] unwittingly shows how far the lower courts departed from the accepted and usual course to indulge Respondents

Here, the *judgments* below dismissed a doctor's two meritorious civil rights cases *explicitly* because she "used paper clips" to gather some of the 1881 pages she produced to Respondents on 21 March 1996 (OPPOSITION at 20)[1], because "both her sisters are physicians,[2]" because she is bright,[3] because "her demeanor" in her 5-day deposition in the first case did not charm the magistrate judge who attended it *or Respondents* (A3), and because a special master was indifferent to her *physical* inability to continue beyond 5:15 pm on the the fifth day of her deposition in the second case (A5). Those judgments also used Rule 11 to sanction her *for having opposed motions to dismiss her claims.*[4]

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[1] Only the guillotine as a penalty for a pin prick can be more draconian than that.

[2] The 11 July 1996 ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION at n3 (OPPOSITION Appendix [hereinafter Opp.App. at 7-8) reads:

> [Dr. Faltas' Title VII case must be dismissed *because*, while she] *had no other treating physician other [sic] than herself* and had placed her medical condition at issue[, and while] parts of the record are susceptible to a reading that she consulted only one sister, *the record also reveals that both [her] sisters are physicians* and the record is certainly not so clear as to rule out consultation with both. *See Generally* Order of Dismissal at 11 and at Appendix A. [emphasis added]

[3] With emphasis added, OPPOSITION at 25 reads:

> As noted in Judge Anderson's July 19, 1996 Order at page 6, the petitioner's "*considerable intelligence and demonstrated legal ability*" compel the conclusion that her "*behavior was . . . . a matter of bad faith.*"

[4] With emphasis added, the 16 August 1996 SUBSTITUTED ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND (Opp.App. at 25-26) reads:

> although plaintiff was represented at the time the complaint was filed, she was not represented when *she later continued to vigorously advance the claims in the complaint* both in oral arguments and *in written opposition to the defendants' dispositive motions.*

B. The Departure Began with Disregard of 28 U.S.C. §455(b) and of *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

Any division in *Liljeberg* was on scienter *only*. All Justices agreed that Judge Collins (trier of *Liljeberg*) should have recused himself as soon as he knew of Loyola's interest. Judge Anderson's 11 October 1995 ORDER shows his grasp of the implications of Dr. Faltas' challenge to the constitutionality of S.C. Insurance Reserve Fund [hereinafter SIRF]. He also knew that his brother is on SIRF's payroll. Had a court invalidated SIRF (Question 7 and PETITION at 11), his brother would have lost his SIRF income which is covered by 28 U.S.C. §455(d)(4).[5]

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5 This chart samples how he punished her, with his disparate treatment of people in equal situations, for *unwittingly* jeopardizing his brother's income:

Dr. Faltas' Relatives	Respondents' Relatives
He dismissed Dr. Faltas' Title VII case because she testified that she did not know the address of her baby sister who was still a medical student at the time of the complaint but had graduated before the deposition.	He imposed Rule 11 sanctions on Dr. Faltas for having sued Eslinger's husband despite testimony that the latter had bought her law practice and his ruling that a claim against Eslinger was not lacking in foundation.
In objecting to the magistrate judge's RECOMMENDATION to dismiss her Title VII case, Dr. Faltas showed that there was no legitimate use to Respondents from the address of her baby sister. But Judge Anderson took it as bad faith. n 2 SUPRA	When Dr. Faltas argued that Respondent Creswick's ownership of Eslinger's law practice made him a respondent superior, Judge Anderson ruled that Dr. Faltas was arguing in bad faith that every husband is his wife's employer. Opp.App. at 28-29
During the deposition in the second case, Eslinger insisted on finding Dr. Faltas' sisters, WHO HAVE NOTHING TO DO WITH EITHER CASE; but the judge lifted the 5-day limit on the deposition instead of sanctioning Eslinger by terminating it. OPPOSITION at 21	When Eslinger eluded service of the complaint by certified mail, Dr. Faltas telephoned to confirm her address; the judge reacted with a BROAD UNCONSTITUTIONAL injunction against Dr. Faltas without evidence that she did anything wrong. OPPOSITION at 12.

Judge Anderson recused himself in October 1996 from all matters involving Dr. Faltas—*after* he had dismissed her cases and imposed Rule 11 sanctions on her, *infra*, for her claim against SIRF managers *inter alia*. He always attributed her shock at his rulings to some unidentified evil on her part, not to his bias which §455(b) anticipates.

C. Manifest Abuse of Rule 11 Powers Resulted.

Judge Anderson's 16 August 1996 ORDER (Opp.App. at 29) insists:

> Plaintiff also argues that the court had a duty to dismiss her claims under 28 U.S.C. §1915(d), if at all, and that because the claims were not dismissed prior to service, the court is precluded from imposing Rule 11 sanctions. Such an interpretation would turn a tool available to courts to protect defendants from frivolous claims into a shield to protect the filers of frivolous claims[,...] deny the court the advantage of briefing by the parties when that would be helpful and delay the service of most *in forma pauperis* complaints. *Not only is this court confident that none of these results was intended by Section 1915(d), but it is confident that plaintiff knows it.* [emphasis added]

What Dr. Faltas "knows" is the very opposite of "it": Since *Boyce v. Alizaduh*, 595 F.2d 948, 950 (4th Cir. 1976), *the Fourth Circuit* follows Judge Aldisert's committee's recommendation that:

> the decision whether to dismiss pursuant to §1915(d) be made *prior to the issuance of process. In this way the defendant will be spared the expense and inconvenience of answering a frivolous complaint.* The committee recommends dismissal with no opportunity to respond when the complaint is irreparably frivolous or malicious. . . . *If there are multiple defendants, the complaint should be dismissed as to those defendants against whom a frivolous or malicious cause of action is alleged and should be allowed to continue against the other defendants.* [emphasis added]

And *Neitzke v. Williams*, 490 U.S. 319, 320 (1989), was unanimous:

> The question presented is whether a complaint filed in *forma pauperis* which fails to state a claim under Federal Rule of Civil Procedure 12(b)(6) is automatically frivolous within the meaning of 28 U.S.C. § 1915(d). The answer, we hold, is no.

Nothing having ever appeared to the contrary, "frivolous" must have the same meaning in Rule 11 and in §1915. To fulfil its goal of protecting defendants from sanctions-proof plaintiffs' malice or frivolity, §1915 requires no less, *but allows no more*,[6] than rigorous screening *before issuance of process*, which compels at least a presumption that claims that passed the judge-administered §1915 test *cannot later fail the same test administered by the same judge* only under a Rule 11 rubric.[7] If the judge omitted his §1915 duties, he compounded his error by shifting to Dr. Faltas costs that would *not* have been incurred had he denied service on those defendants who later filed extensive Rule 12 motions then moved for Rule 11 sanctions to recover their costs.[8]

Having given *all claims* in Dr. Faltas' second complaint the §1915 *not-frivolous-or-malicious* stamp of approval, and being legally barred from finding a claim that fails the Rule 12(b)(6) test automatically frivolous, Judge Anderson seized on Attorney Briggs' letter inviting settlement talks to find "improper purpose" in her innovative claims.

His punitive zeal is evident from his haste to award Rule 11 sanctions to those named *solely* as jointly liable with Eslinger even after he was constrained to find (based on the 28 October 1993 letters, n 8 *supra*) that Dr. Faltas' claim for tortious interference with contract against Eslinger was not "lacking in factual foundation" or sanctionable.

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6 Dr. Faltas never deemed post-filing conduct outside courts' regulatory power. But imposing Rule 11 sanctions on a *pro se* plaintiff for *opposing dismissal* of claims that are neither frivolous nor malicious (as evidenced by their having passed the §1915 test) would have been funny had it not been cruel.

7 Even then, only enough to deter further claims may be imposed; *i.e.*, the sanction must be proportionate to the plaintiff's, not the defendant's, wallet.

8 Please do NOT fail to see the full text of Eslinger's 28 October 1993 letters (at Petitioner's Appendix A26-31). *These letters were submitted to Judge Anderson* for *in camera* review before he granted Rule 11 sanctions *or* dismissed either case (11 July 1996 ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION at n4 [A7-8 and Opp.App. at 10]). He withheld them from Petitioner and denied *her* discovery on them. But they prove that said defendants had knowingly embarked on expensive legal adventurism at state expense.

II. Sanity Needs to be Restored to Discovery.

A. This Court often examines the fairness of sanctions.

This Court requires discovery sanctions to be "just." *Hovey v. Elliot*, 167 U.S. 409 (1897), reversed dismissal as punishment for contempt. *Societé internationale pour participation industrielles et commerciales v. Rogers*, 357 U.S. 197 (1958), credited a fear of violating Swiss laws. *Degen v. U.S.*, 116 S.Ct. 1777 (1996), allowed a fugitive to participate in discovery *on his own terms*. And *Whirlpool v. Marshall*, 445 U.S. 1 (1980), upheld all civilians' right to disobey orders reasonably *perceived* to threaten life or health. Dr. Faltas is neither a contemnor nor a fugitive; she is *a physician* whose "several physical ailments" were already on record, who treated herself (n 2, *supra*), and whose best *medical* judgment compelled her to leave her deposition at 5:15 pm, *offering to resume it under medically necessary arrangements.* "*Questions of medical judgments are not subject to judicial review.*" *Boyce, supra*, at 953, n9.

B. The lower courts and the defense bar created a "discovery for its own sake" culture which culminated in travesty in this case.

Hickman v. Taylor, 329 U.S. 495, 516 (1946), prophetically taught: "*Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversaries.*"

The Federal Rules of Civil Procedure match *Hickman* in protecting every party from being forced to engage in interpretive exercises for the benefit of another. FRrCP 33(d) and 34(b) provide, respectively [with emphasis and reemphasis added]:

> Where the answer to an interrogatory may be derived ... from the ... records of the party upon whom the interrogatory has been served *or from* ... a compilation ... or summary, thereof and the burden of deriving ... the answer is substantially the same for the party serving the interrogatory as for the party served, *it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained* and to afford the party serving the interrogatory reasonable opportunity to examine ... such records *and to make copies*, ...
>
> A party who produces documents for inspection shall produce them *as they are kept in the usual course of business or* .....

And FRCP 26(b)(2)(i) expects courts to take "into account the parties' resources" and to consider "whether the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." Moreover, FRCP 26(b)(2) mandates "taking into account the needs of the case;" and FRCP 26(c)(3) empowers courts to order "that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery." Clearly, it is *the one making, not seeking,* discovery who chooses the details of compliance.

But Judge Anderson failed to keep the nature and needs of the cases in sight. He never determined what prejudice (if any) befell Respondents from anything Dr. Faltas was unable to give them *(because it did not exist, because defendants alone had it, or because she did not otherwise have it).* Instead, he kept ruling that she must be invaded, but they protected, *because* it is she, not they, who sued; *e.g.*, Opp.App. at 18.

And the usual financial incentives to keep discovery in line with the case were lifted or reversed here. The state covers all legal costs, not through an attorney general answerable to the electorate, but through private lawyers paid by the hour and immune to all political and market forces (Question 7, PETITION at 11) The result is outrage; *e.g.*:

(1) In October 1994, they wanted her to take her documents to their office *and leave them there;* (2) Circa 5:00 pm on 21 May 1996, Dr. Faltas testified that Defendants had defamed her to "the readers of *The Charleston Post and Courier.*" Eslinger followed up *twice:* "Name them!"

Ten days[9] of that could not have been "achieved" without deposing counsel's loading the questions with repetitions and irrelevancies.[10]

9 The first deposition started open-ended but, on the third day, the district court limited it to five days. The reverse happened with the second deposition; but a shocking 15 May 1996 ORDER had barred her from using at trial any evidence she gives during her deposition if she had not *previously* given it in writing.

10 Contrary to OPPOSITION at 11 and 22, common sense, not review of 35 videotapes, is needed to know that and to know that it irritated Dr. Faltas. Had her irritation crossed a mark, the correct penalty would have been for the judicial or quasi-judicial officer present to cite her for contempt of court, not dismissal.

Common sense also sees in the dates sprinkled throughout OPPOSITION a pattern of inactivity from January to May 1995, followed by a very busy June 1995. The reason is not delay by Dr. Faltas but judicial freeze on discovery pending resolution of the Rule 12 motions.[11] Having, *well before trial*,[12] obtained *all* her *responsive*[13] documents and tapes,[14] Respondents complain along two *mutually exclusive* themes:

(1) They could not "understand" the probative value of her documents because she produced them in the chronological order *in which she kept them*, not in the order of Respondents' oppressively numerous, overbroad, repetitive and *hopelessly overlapping*, interrogatories and requests for production (OPPOSITION at 19-20).[15] They invent "her bad faith" to blame for that in lieu of their "no wits."

(2) After seeking *and receiving* her documents "which support [her] claims," they were unable to use them "to prepare a defense." They ascribe *that* to "abuse of discovery," not to the strength of her case.

Per this illogic of dismissal *for failure to create a defense*, the stronger a case, the likelier it is to be dismissed; and defense counsel may *veto* any case from going to trial by simply playing dumb in discovery. Nor is dismissal a, much less *the only*, deterrent as *per* OPPOSITION at 27, 29.

11 That period should not count against her. And a May 1995 ORDER protecting her from any discovery on RICO (after dismissal of the RICO claims and of several defendants in April 1995) reduced the number of her responsive documents *exponentially* to "only 713 pages." OPPOSITION at 7. No law entitles a defendant to a magic number of pages from a plaintiff below which dismissal is mandated. They never showed that she withheld anything responsive.

12 After discovery was unfrozen, Dr. Faltas obtained a few brief extensions.

13 They never sought documents "helpful to defendants" (none exists anyway), only the documents, facts, and witnesses that "support [some of her] claims."

14 Specious is their feigned fixation on "corroborating witnesses." Defendants' own authentic writings and recorded speech are *per se* evidence of their acts and motives. Corroboration, if available, would have been only cumulative.

15 That would have required her to make 50 copies of most of her 15 tapes and 2,500 pages to create separate sets responsive to each numbered question.

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Dismissal of "the USC case" deterred *nothing* in "the Attorney General case" which was also dismissed as a discovery sanction. When asked for the impossible,[16] Dr. Faltas will always fail to comply no matter how many times she was sanctioned for such failure before.

C. Title VII Cases Need a Discovery Scheme Parallel to the Shifting Burdens Scheme of Proof, particularly after *McKennon v. Nashville Banner*, 115 S.Ct. 879 (1995):

> Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge. *The concern that employers might as a routine matter undertake extensive discovery into an employee's background or performance on the job to resist claims under the Act is not an insubstantial one*, but we think the authority of the courts to award attorney's fees ... and ... to invoke the provisions of Rule 11 of the Federal Rules of Civil Procedure will deter most abuses. [emphasis added]

Thus ends *McKennon* but begin new questions: (1) After how much discovery[17] must the employer concede that no reason of *McKennon* severity exists? (2) What if the employer obtains in discovery a lesser reason but tries to pass it off at trial as *the true pre-decision* reason?

This Court and Congress having limited the defenses admissible in Title VII cases to unmixed pre-decision motives, and proper discovery being what leads to admissible evidence, a decision tailoring discovery accordingly is a natural, much needed sequel to *McKennon*.

This case offers an opportunity for such decision, for it shows the travesty of untailored discovery. Petitioner was branded "abusive" for arguing below that Respondents should have a had "a defense" before the adverse action, not expect to discover one from her in litigation.

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16 Finding "a defense" for Respondents where none exists entails the *moral* impossibility of agreeing under affirmation that their *false* pretexts are true and the *intellectual* impossibility of naming everyone who read a newspaper.

17 A never-ending discovery may be motivated by undying hope, not bad faith.

Respondents had *not* gone to court cold. The final decision to fire Dr. Faltas was made *in November 1993* by USC *after its receipt of* the 28 October 1993 letters from Eslinger, *who was not then USC's counsel.*

The letters urged USC to fire Dr. Faltas and offered defenses (each a *per se* Title VII violation): (1) use "immigration" against her; (2) treat her request for prevention of recurrence of the offending conduct as rejection of reinstatement; (3) "insist" on firing her because she had Title VII claims against prior employers; and (4) undermine USC's own appeal committee's finding that the factual pretexts given for dismissing her are false. (PETITION at 5 and A26 - A31, and n 8, *supra*)

Dr. Faltas' two complaints are very detailed (49 pages each) and survived ten Rule 12 motions. At proper points, she moved the district court to decide if, *as a matter of law*, USC was concluded by its own appeal committee's factual findings, requiring judgment to be entered in her favor as to liability. "Discovery first" was the response.

Against Dr. Faltas' legally and factually unassailable cases, Respondents (who had nothing *admissible* to discover), stopped at nothing.[18]

Their contrivances were indulged by a judge who recused himself one year and two dismissals too late. He was affirmed by a Court of Appeals where "*decisions are handed down with only the tangential involvement of Article III judges.*" PETITION at 11, quoting their *Nasim*.

CONCLUSION

Because the lower courts' indulgence of Respondents warrants an exercise of this Court's supervisory power, and because this case presents novel important questions, the petition for a writ of *certiorari* should be granted.

Respectfully submitted by
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18 Ordering Dr. Faltas, known to have partial vocal cord paralysis (OPPOSITION at 23), to testify beyond 5:15 pm on a day that started at 9:00 am—all after she testified thrice to being "very tired"—is nothing short of physical torture.